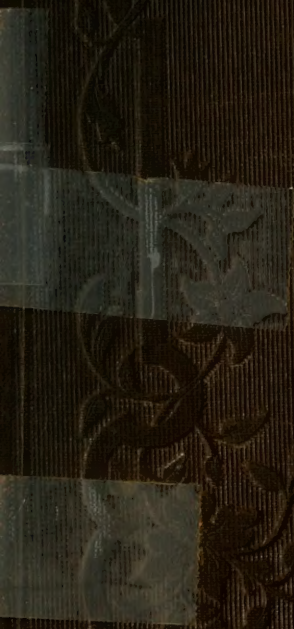


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AN ESSAY

G. W. Nichol

ON

THE NEW STATUTES

RELATING TO

LIMITATIONS OF TIME,

ESTATES TAIL, DOWER, DESCENT, OPERATION OF DEEDS,

MERGER OF ATTENDANT TERMS,

DEFECTIVE EXECUTIONS OF POWERS OF LEASING,

WILLS, TRUSTEES AND MORTGAGEES.

BY

SIR EDWARD SUGDEN.

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THE foundation of this Essay was a chapter in the Writer's Treatise on Vendors and Purchasers, which, however useful in that work when the new laws were but little known, no longer forms a fit portion of it now that the decisions upon the acts have become numerous and important, as it would be inconsistent with the main object of the Treatise to load it with the introduction of the points decided. It is hoped that the Essay in its present shape will be found to be a useful compendium of the statute law as expounded by the decisions of our various Courts. A perusal of the Work will show where the legislative remedy is faulty, and requires amendment ; and this is a subject to which the attention of the Government should be directed : No time should be lost in amending the law as to the execution of Wills.

Uciana 9-2-33

Boyle Farm, 6th December 1851.

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(a) Add the name of the case to the reference (u) in p. 138, and to (x) in p. 140.

ADDENDA.

IN p. 392, pl. 10, refer to *Rowley v. Adams*, 3 Mac. & Gor. 130; as to a sufficient refusal by a married woman to surrender a copyhold.

In p. 397, pl. 19, refer to *In re Meyrick's Estate*, 9 Hare, 116; an administrator of a mortgagee who died intestate, and his heir is unknown, cannot obtain an order vesting the estate in him, subject to the equity of redemption.

In p. 404, pl. 34, refer to *In re Hodson's Settlement*, 9 Hare, 118; section 32 does not enable the Court to discharge a trustee willing to remain, nor can the Court act where there is a power to appoint new trustees, although it may have been intended to corruptly exercise it; see p. 408; but if one trustee is a lunatic, although there is a power in the settlement, the Court will act. *In re Davies*, 3 Mac. & Gor. 278.

In p. 390, pl. 5, and in p. 405, pl. 34, refer to *In re Watts's Settlement*, 9 Hare 106; as to a vesting order severing a joint-tenancy; and refer to the same case in p. 412, pl. 47: that bankruptcy, &c. does not create an incapacity to act.

In p. 415, pl. 55, add a reference to *Newman v. Warner*, 1 Sim. N. S. 457; trustees appointed by the Court in lieu of trustees in a settlement, cannot exercise a power of sale in the settlement to the trustees and the survivor of them, his executors and administrators.

In p. 417, pl. 60, refer to *In re Davies*, 3 Mac. & Gor. 278; Lord Chancellor of Great Britain no jurisdiction over lands in Ireland.

In p. 417, pl. 58, refer to *In re Were*, 3 Mac. & Gor. 233; inquiry directed before the Master.

AN ESSAY

ON THE

NEW LAWS OF REAL PROPERTY.

CHAPTER I.

OF THE TITLE BY NON-CLAIM.

SECTION I.

OF THE BAR UNDER THE OLD LAW.

- | | |
|--|---|
| 2. <i>Old statutes barred the remedy only.</i> | 10. <i>Rule in equity as to trusts.</i> |
| 3. <i>Savings in 32 H. 8.</i> | 14. } <i>As to an equity of redemption.</i> |
| 4. <i>And in 21 Jac. 1.</i> | 18. } |
| 6. <i>Presumption of death.</i> | 17. <i>In cases of fraud.</i> |
| 7. <i>Disability of coparcener.</i> | 20. <i>Disabilities in equity.</i> |
| 8. <i>Sixty years' possession not a title.</i> | 21. <i>Title by non-claim.</i> |
-

1. IT is proposed first to consider generally the operation of the old statutes of limitations, and then to proceed to an examination of the provisions of the new statute of limitations; and first of the law as it stood before the late statute.

2. The statutes of limitations operated by way of bar to the *remedy*, and not, like the statutes of fines, as a bar to the *right* (a). Therefore, although a person

(a) See *Beckford v. Wade*, 17 Ves. 37.

was barred of one remedy, yet he could pursue any other remedy which might afterwards accrue to him. Thus, where a tenant in tail discontinued for three lives, and the issue in tail was barred of his formedon by the 21 Jac. 1. (*b*) ; afterwards by the death of the three tenants for life, a right of entry accrued to the issue, who entered, and his entry was held lawful (*c*).

3. It has frequently been thought that the rights of infants, femes covert, persons in prison, and beyond sea, are saved by the act of 32 Hen. 8. (*d*) ; but on examination it will appear, that the savings extended only to persons who laboured under any of those disabilities *at the time the statute was made* (*e*).

4. The saving clause in the act of James only extends to the persons on whom the right *first* descends ; and therefore, when the time once began to run, nothing could stop it (*f*). So that on the death of a person in whose life the time first began to run, his heir must have entered within the residue of the ten years, although he laboured under a disability at the death of his ancestor ; and issue in tail were barred like heirs in fee-simple (*g*).

5. In the case of a fine, it was formerly thought, that if a person died under a disability, his heir was excepted out of the statute of fines, by the proviso (*h*) ; but the contrary was determined by a modern case (*i*). In the statute of James, the legislature being aware of

(*b*) Ch. 16.

(*c*) Hunt v. Bourne, Lutw. 781 ;
2 Salk. 422 ; Com. 124 ; 1 Bro.
P. C. 53.

(*d*) Ch. 2.

(*e*) See Bro. Reading, p. 60.

(*f*) Doe v. Jones, 4 T. Rep. 300 ;
Cotterell v. Dutton, 4 Taunt. 326.

(*g*) S. C. Tolson v. Kaye, 3 Brod.
& Bing. 217 ; 6 Mann. & Gran.
589.

(*h*) See Cruise on Fines, 258,
and the cases there cited.

(*i*) Dillon v. Leman, 2 H. Black.
584.

this point, expressly provided for the *death* of the person to whom the *first* right should descend; and, therefore, where a person to whom the right first descended, died under a disability, his heir must have entered within ten years after his death (*k*).

6. It seems that where no account can be given of a person within the exceptions in the act, he will, at the expiration of seven years from the last account of him (*l*), be presumed to be dead: and this rule applies equally to the new act. But the presumption only is that the person is dead; not that he died at the beginning or the end of any particular period during those seven years, and therefore if it is important to any one to establish the precise time of such person's death, he must do it by evidence of some sort to be laid before the jury for that purpose, beyond the mere lapse of seven years since such person was last heard of (*m*).

7. The disability of one coparcener would not preserve the title of the other, who must have entered within twenty years after the title accrued, although during the whole time her coparcener laboured under a disability (*n*).

8. It was generally conceived, that a possession for sixty years created a good title against all the world. Thus Judge Jenkins (*o*) lays it down, without qualification, "that a peaceable possession for sixty years makes a right; for 21 Jac. 1, c. 16, takes away the entry and assize; 32 Hen. 8, takes away the writ of

(*k*) See Jenkins, 4 Cent. pl. 97; Doe v. Jesson, 6 East, 80; Cottrell v. Dutton, 4 Taunt. 826, and observations in 10th edition of Purch.

(*l*) Doe v. Jesson, *ubi sup.*; Doe v. Nepean, 5 Barn. & Adol. 36.

(*m*) Doe v. Nepean, 5 Barn. & Adol. 36; Nepean v. Doe, 2 Mees. & Wels. 912; see Sugd. Conc. View, 307.

(*n*) Roe v. Rowleston, 2 Taunt. 441.

(*o*) 1 Cent. pl. 49.

right and the formedon." So Mr. Justice Blackstone says (*p*), "that the possession of lands in fee-simple and uninterruptedly for sixty years, is at present a sufficient title against all the world, and cannot be impeached by any dormant claim whatsoever." But it was possible that an estate might be enjoyed adversely for hundreds of years, and yet at last be recovered by a remainder-man. For instance, suppose an estate to be limited to one in tail, with remainder over to another in fee, and the tenant in tail to be barred of his *remedy* by the statutes of limitation, it is evident that, as his *estate* subsisted, the *remainder-man's right* of entry could not take place until the failure of issue of the tenant in tail, which might not happen for an immense number of years.

9. After passing the act of 32 Henry 8, and before that of the 21 Jac. 1, although a man had been out of possession of land for sixty years, yet if his entry was not tolled, he might enter and bring any action of his own possession (*q*). Some writers thought this still to be law (*r*), but the rule in this respect was altered by the statute of James; by which no person could *enter* except within twenty years after his title accrued.

10. The rule in equity, that the old statute of limitations did not bar a trust-estate, held only as between *cestui que trust* and trustee, not between *cestui que trust* and trustee on one side and strangers on the other; for that would be to make the statute of no force at all, because there is hardly an estate of conse-

(*p*) 3 Com. 196; see *Taylor v. Horde*, 1 Burr. 60; 5 Bro. P. C. 247; Cowper, 689.

(*r*) Wood's Inst. 557; and Christian's note to 3 Black. Com. 196.

(*q*) See *Bevill's case*, 4 Co. 11 b.

quence without such a trust, and so the act would never take place.

11. Therefore, where a *cestui que trust* and his trustee were both out of possession for the time limited, the party in possession had a good bar against both (*s*).

12. Although the statute could not, as between the trustee and *cestui que trust*, operate as a bar to the latter, yet the trustee might, in some cases, be barred by the possession of the *cestui que trust*, or those claiming under him (*t*). A *cestui que trust* is as a tenant at will to the trustee, and his possession is the possession of the trustee (*u*); and therefore, unless under very particular circumstances, time could not operate as a bar (*v*). Where a *cestui que trust* sold or devised the estate, and the vendee or devisee obtained possession of the title-deeds, and entered and did no act recognising the trustee's title, there was great reason to contend that this was a disseisin of the trustee, and, consequently, that the statute would operate from the time of such entry. This was a point which daily occurred in practice; but it rarely happened that a purchaser could be advised to dispense with the conveyance of a legal estate, where the defect would appear on the abstract when he sold. And where

(*s*) *Per* Lord Hardwicke, in *Llewellyn v. Mackworth*, Barnard. Rep. Cha. 445; 15 Vin. Abr. 125, n. to pl. 1; and see *Townsend v. Townsend*, 1 Bro. C. C. 550; *Clay v. Clay*, 3 Bro. C. C. 639, n.; *Ambl.* 645; *Herey v. Ballard*, 4 Bro. C. C. 469; *Harmood v. Oglander*, 6 Ves. 199; 8 Ves. 106; *Hovenden v. Lord Annesley*, 2 Scho. & Lef. 629; *Scott v. Knox*, 1 Long. & Towns. 381.

(*t*) *Lord Portsmouth v. Lord Effingham*, 1 Ves. 430; *Harmood v. Oglander*, 6 Ves. 199; 8 Ves. 106. See 2 Mer. 360.

(*u*) 1 Ventr. 329.

(*x*) 3 Mod. 149; *Earl of Pomfret v. Lord Windsor*, 2 Ves. 472; *Keene v. Deardon*, 8 East, 248; *Smith v. King*, 16 East, 283.

there had been any dealing on the legal estate, and it had been recently noticed in the title-deeds as a subsisting interest, it was clear that a purchaser was bound to consider it as such (*y*).

13. The statutes of limitations certainly could not operate as between *cestuis que trust*; but it seems that equity, in analogy to the statute, would hold time a bar (*z*); and indeed that equitable rights in general would, by the like analogy, be affected by time in the same manner as legal estates (*a*).

14. This is exemplified, in some degree, by the rules respecting an equity of redemption, which is a mere creature of the Court (*b*).

15. In *Clay v. Clay* (*c*), Lord Camden laid down this doctrine very clearly. He said, "as often as Parliament has limited the time of actions and remedies, to a certain period, in legal proceedings, the Court of Chancery adopted that rule, and applied it to similar cases in equity. For when the Legislature has fixed the time at law, it would have been preposterous for equity (which by its own proper authority always maintained a limitation) to countenance laches beyond the period that law had been confined to by Parliament. And therefore, in all cases where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar."

(*y*) *Goodtitle v. Jones*, 7 Term Rep. 47.

(*z*) *Harmood v. Oglander*, *ubi sup.*

(*a*) 1 Atk. 476; *Stackhouse v. Barnston*, 10 Ves. 466; *Hovenden v. Lord Annesley*, 2 Scho. & Lef. 630; *Lord Egremont v. Hamilton*, 1 Ball & Beat. 516.

(*b*) *White v. Ewer*, 2 Ventr. 340; *Pearson v. Pulley*, 1 Cha. Ca. 109; *Jenner v. Tracey*; *Belch. v. Harvey*, 3 P. Wms. 287, n. Appendix, No. 13, to Purch.

(*c*) 3 Bro. C. C. 639, n.; *Ambl.* 645; and see *Ex parte Dewdney*, 15 Ves. 496; *Medlicott v. O'Donel*, 1 Ball & Beat. 156.

16. In *Beckford v. Wade* (*d*), Sir William Grant, in delivering judgment, said, that it is certainly true that no time bars a direct trust as between *cestui que trust* and trustee; but if it was meant to be asserted that a court of equity allows a man to make out a case of constructive trust, at any distance of time after the facts and circumstances happened out of which it arises, he was not aware that there was any ground for a doctrine so fatal to the security of property as that would be; so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who, after long acquiescence, comes into a court of equity to seek that relief.

17. And it seems that even in cases of fraud, where the facts constituting the fraud were known, where there was no subsisting trust or continuing influence, the same principle would apply (*e*).

18. It was held by Sir William Grant, that whilst the equity of redemption subsisted, the question to whom it belonged must remain open; and therefore mere possession without title would not give any person a right to redeem (*f*). The right belonged to him who showed a title, although he had been out of possession upwards of twenty years. But Sir Thomas Plumer decided otherwise, and his decision was affirmed in the

(*d*) 17 Ves. 97. See 2 Hargr. Jur. Exc. p. 394; *Scott v. Knox*, 4 Ir. Eq. Rep. 397.

(*e*) 1 Ball & Beat. 166.

(*f*) *Cholmondeley v. Clinton*, 2 Mer. 173; *Grenfell v. Girdlestone*, 2 You. & Coll. 662.

House of Lords (*g*). And it seems that unless in the case of disability, twenty years' adverse possession was a bar to relief in equity (*h*).

19. But if a mortgagee purchased an interest in the equity of redemption—for example, the estate of the tenant for life—he became liable to perform the obligations of the seller, and was therefore bound to keep down the interest, and consequently the redemption would thus be kept open (*i*).

20. The legal provisions were so strictly adhered to, that persons labouring under any of the disabilities specified in the statute of limitations, were allowed the same time as they would have been entitled to in the case of a legal claim (*k*).

21. These observations may be closed by observing, that few cases occurred in which a title depending on the statute of limitations could be recommended. The bare receipt of rent was no ouster, for it is a contradiction in terms, that a man by wrong should have my right (*l*); so the non-payment of rent was no ouster, and therefore the operation of the statute was frequently prevented by the existence of a lease granted

(*g*) 2 Jac. & Walk. 1, 189, n.; Tweddell v. Tweddell, Turn. & Russ. 11, 12.

(*h*) See Price v. Copner, 1 Sim. & Stu. 347.

(*i*) See Corbett v. Barker, 1 Anst. 138; 3 Anst. 755; Raffety v. King, 1 Kee. 601; Browne v. Bishop of Cork, 1 Dru. & Wal. 700.

(*k*) Lytton v. Lytton, 2 Bro. C. C. 441. Two cases on this point were for a long time depending, Pimm v. Goodwin, before Lord Eldon, and Blake's case before

Lord Manners, in Ireland. See 2 Mer. 240; Blake v. Foster, 2 Ball & Beat. 565; 4 Bligh, O. S. 133, 140; Beat. 461; Harrison v. Hollins, 1 Sim. & Stu. 471; Raffety v. King, 1 Kee. 601.

(*l*) Gilb. Ten. 97. Goodright v. Jones, Cruise on Fines, 3d edit. 295; Doe v. Danvers, 7 East, 299; and see Orrell v. Maddox, Runnington's Eject. 458; Saunders v. Lord Annesley, 2 Scho. & Lef. 73. Consider Hovenden v. Lord Annesley, 2 Scho. & Lef. 623.

by the person whose interest, or the interest of persons claiming under him, was sought to be barred. So (*m*) there might be a case where the circumstance of concealing a deed would prevent the statute from barring; but then it must have been a *voluntary and fraudulent* detaining; for to say that merely having an old deed in one's possession should deprive a man of the benefit of the act, would have been going too far, and would be a harsh construction of a statute made for the quieting of possessions.

(*m*) *Per* Lord Hardwicke in *Snell v. Silcock*, 5 Ves. 469; *Llewellyn v. Mackworth*, Barnard. Bowles *v.* Stewart, 1 Scho. & Lef. Rep. Cha. 445; 15 Vin. Abr. 126, 209; *Bond v. Hopkins*, *ib.* 413; pl. 8; 2 Eq. Ca. Abr. 579, pl. 9; *Hovenden v. Lord Annesley*, 2 *Dormer v. Parkhurst*, 3 Atk. 124; Scho. & Lef. 607.

SECTION II.

OF THE NEW LAW: 3 & 4 W. 4, C. 27.—WHAT THE ACT HAS ABOLISHED.

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| <p>2. <i>All real and mixed actions, except dower, quare impediat, and ejectment.</i></p> <p>3. <i>Savings.</i></p> <p>4. <i>Descent cast, discontinuance, &c. abolished.</i></p> | <p>5. <i>Continual claim also.</i></p> <p>6. <i>Right extinguished.</i></p> <p>7. <i>Time runs from what period.</i></p> |
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1. Thus the law stood before the late important Act of 3 & 4 Will. 4, c. 27. It is seldom possible to understand a law which repeals a former one and substitutes new provisions, unless we have a competent knowledge of the law repealed. It has, therefore, in-

dependently of the savings in the act, been thought useful to retain the foregoing short account of the old law as a fit introduction to the new one.

Under this head we are to consider, 1. What the act has abolished. 2. The new period of non-claim, and when the time first accrues. 3. The savings from disabilities. 4. Of adverse possession. 5. Where the bar of tenant in tail extends to those in remainder. 6. Of bars in equity. 7. Of money charged on land, legacies, dower, rent, and interest. 8. Of church property and of advowsons. 9. The limits of the act. 10. Of rights of common, of way, and of water, and of lights; and, 11. Of moduses and exemptions from tithes. And first, what the act has abolished.

2. All real and mixed actions of every description are abolished after 31st December 1834, except a writ of dower, *quare impedit*, or an ejectment (*a*); but the right to bring real actions where there was no right of entry, was saved till the 1 June 1835 (*b*), under which saving the last writ of right that can be maintained has been tried.

3. And there is a further saving which is still in operation: this applies to cases where, on the 1st June 1835, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance, or warranty, might maintain any such writ or action as is abolished, such writ or action may be brought after that day, but only within the period during which, by virtue of the provisions of the present act, an entry might have been made by the person bringing such writ or action, if his right of entry had

(*a*) Sec. 36.

(*b*) Sec. 37; and see the saving

in s. 15, which has ceased to operate.

not been so taken away (*c*); so that, although *such* rights are preserved, yet they are brought, as to the period within which they may be maintained, within the limits allowed by the act, where a right of entry exists.

4. And consistently with this saving, it is provided that after the 31st December 1833, no descent cast, discontinuance, or warranty, shall toll or defeat any right of entry or action (*d*), and thus this doctrine is at an end in this important respect (*e*).

5. Continual or other claim will no longer preserve any right of entry, or distress, or action (*f*).

6. As we have already seen, the old statutes of limitation barred the remedy, but did not extinguish the right; but now, when the remedy is barred by time, the right and title of the person in any land, rent, or advowson, whose remedy is taken away, is extinguished (*g*). This is a great improvement, and very much assists titles depending upon non-claim. The rights of the Crown are subject to a like provision, under another act of Parliament (*h*). The effect of the statute is, after the proper period of limitation has passed, to vest the legal fee simple in the party who has been in possession during that period, and he is competent to convey it to another, and consequently such a title may be forced upon a purchaser (*i*); and so may a title depending upon non-claim, even against the Crown, where the Crown is specially barred

(*c*) Sec. 38.

(*g*) Sec. 34.

(*d*) Sec. 39.

(*h*) Tuthill v. Rogers, 1 Jo. & Lat. 36.

(*e*) And as to warranty, vide Purch. p. 574.

(*f*) Sec. 11; and as to possession by joint-tenants, younger brother, &c., vide *post*.

(*i*) Scott v. Nixon, 3 Dru. & War. 388.

by act of Parliament, in which there is a like provision barring the estate as well as the remedy (*k*).

7. Before I proceed to state the new period of limitation, I may observe, that unless where existing rights are preserved in the instances already pointed out, the time which may have run *before* the passing of the act, even where it has not barred the right, will count as part of the period allowed by the new law, and therefore it will continue to run until it amounts to the twenty years, or it may be the forty years allowed, as we shall presently see, by the new law.

(*k*) *Tuthill v. Rogers, ubi sup.*

SECTION III.

OF THE PERIOD OF NON-CLAIM, AND WHEN THE TIME FIRST
ACCRUES, AND OF SAVINGS FOR DISABILITIES.

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| <ol style="list-style-type: none"> 1. <i>Meaning of words in the act.</i> 2. { <i>Twenty years' non-claim a</i> 7. { <i>bar: an ejectment the re-</i> <i>medy: sect. 2.</i> 3. <i>But tithes recoverable from oc-</i> <i>cupier.</i> 4. <i>Turnpike tolls not within the</i> <i>act.</i> 5. <i>Quarries and limestone land</i> <i>are.</i> 6. <i>Heriots and certain rents, how</i> <i>far affected.</i> 8. { <i>In cases of possessions when</i> 9. { <i>time accrues: sect. 3:</i> 1. <i>When claimant has</i> <i>been in possession.</i> 2. <i>When a deceased per-</i> <i>son was last in pos-</i> <i>session.</i> 3. <i>When a grantor was</i> <i>last in possession.</i> | <ol style="list-style-type: none"> 10. { <i>Rent created by will within</i> 14. { <i>2d section: James v. Salter,</i> <i>with observations.</i> 15. <i>Adverse possession in the old</i> <i>sense no longer necessary.</i> 16. <i>Section 2 extends to mortgages</i> <i>as to the land.</i> 17. <i>There must be an available right</i> <i>of entry: party binding him-</i> <i>self by estoppel.</i> 18. <i>Possession as apparent owner</i> <i>may be held a tenancy at will.</i> 19. <i>Whether time ran against a</i> <i>mortgagee where interest</i> <i>paid: Doe v. Williams.</i> 20. <i>Now by statute time runs only</i> <i>from last payment of any</i> <i>part of principal or interest.</i> <i>—Mortgagee tenant for life</i> <i>of land.</i> |
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21. *Time does not run against annuitant whilst annuity is paid.*
22. *Nor against the right to mines reserved, by non-working.*
23. *Rent in 2d section means an estate in a rent-charge, &c.*
24. *Non-payment of rent under lease does not bar a distress.*
25. *When time runs for land and for rent.*
26. *Charities, how far bound by time.*
27. *Heir barred as against devisees may claim what is undisposed of.*
28. *Possession without title good against person barred.*
29. *Time running cannot be stopped, but claimants entitled to same time as their grantor.*
30. } *Trustee of attendant term not*
 31. } *barred by possession of cestui que trust.*
32. *Term to raise portions.*
33. *After twenty years, a power of re-entry in lease cannot be exercised, but lessor may recover when lease expires.*
34. *In cases of reversions where time runs: sect. 3:*
 4. *Reversionary estate, and no possession.*
 5. *On forfeiture or breach of condition.*
35. *On forfeiture or breach of condition, reversioner may wait till possession falls: sect. 4.*
36. *Reversioner's right saved, although he was in possession before estates which have determined: sect. 5.*
37. } *Concurrent rights barred:*
 52. } *sect. 20.*
38. *Grant v. Ellis, with observations.*
39. *"Profits" explained: mean rent as against lessee: sect. 35.*
40. *Right to recover at the end of lease, although rent not paid: Doe v. Oxenham.*
41. *Lease in writing, at no rent, or at one under 20s., not within 9th section: lessor may recover, although rent paid to wrongful claimant.*
42. *Doe v. Mouldsdale: operation of 5th and 20th sections.*
43. *Doe v. Liversedge: what is a recovery of possession within sect. 20.*
44. *The operation of the 5th clause of sect. 3, of sect. 4, and of sect. 5, considered.*
45. *Administrator bound as from the death of deceased.*
47. *Possession by tenant at will: when time runs: sect. 7.*
48. *Meaning of "rent" in that section.*
49. *Continuous tenant at will: qu.*
50. *Possession of tenant at will determined before Act: no bar.*
51. } *But possession before, operative*
 52. } *where continued.*
53. *Purchaser let into possession a tenant at will: a tenant at will may create another.*
54. *Possession by husband primâ facie a fee, cannot be adopted by wife.*
55. *Purchaser in possession a tenant at will: his devisee not such without some act by seller: constructive trusts not within sect. 7.*
56. *Tenancy by sufferance.*

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| <p>57. <i>Right of remainder-man or reversioner to recover, though no rent paid to tenant for life.</i></p> <p>58. <i>Acts amounting to an acknowledgment that a man holds as tenant at will.</i></p> <p>59. <i>Doe v. Moore.</i></p> <p>60. <i>Possession by tenant from year to year, &c. without lease in writing: when time runs: sect. 8.</i></p> <p>61. <i>Meaning of rent in that section.</i></p> <p>62. <i>Rent service within that section: keeping grindstone for parish not a rent.</i></p> <p>63. <i>Continued possession and payment of rent: a new tenancy.</i></p> <p>64. <i>Possession by tenant under lease in writing at 20s. rent or upwards: when time runs: wrongful payment of rent: sect. 9.</i></p> <p>65. <i>Non-payment of rent not adverse.</i></p> <p>66. <i>Rent of mine, in specie: time runs from last receipt.</i></p> | <p>68. <i>Doe v. Gopsall.</i></p> <p>69. <i>Under-tenant bound where immediate tenant is bound.</i></p> <p>70. <i>Making an entry not possession.</i></p> <p>71. <i>Possession by one co-parcener, &c. not the possession of the others.</i></p> <p>72. <i>Co-tenant receiving more than his share.</i></p> <p>73. <i>Possession of younger brother not that of heir.</i></p> <p>74. <i>Acknowledgment of title enlarges time.</i></p> <p>75. <i>What amounts to an acknowledgment.</i></p> <p>76. <i>Saving for five years where the possession was not adverse.</i></p> <hr style="width: 20%; margin: 10px auto;"/> <p>77. <i>Savings for disabilities ten years.</i></p> <p>78. <i>Forty years utmost limit: no saving for successive disabilities.</i></p> <p>79. <i>At what period disability must happen: Owen v. De Beauvoir.</i></p> <p>80. <i>Observations thereon.</i></p> |
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I. OF the period of non-claim, and when time first accrues :

1. The act first explains the meaning of the words in it (a). It is provided that the words and expressions which follow, which in their ordinary signification have a more confined or different meaning, shall in the act, *except where the nature of the provision or the context of the act shall exclude such construction*, be interpreted as follows (that is to say) :

“ Land ” shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to

tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest in them, or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure.

“ Rent ” shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole) (I).

“ The person through whom another person is said to claim ” shall mean any person by, through, or under, or by the act of whom, the person so claiming became entitled to the estate or interest claimed as heir, issue in tail, tenant by the curtesy, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat.

“ Person ” shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons, as well as an individual.

And every word importing the singular number only shall extend and be applied to several persons or things, as well as to one person or thing; and every

(I) The old statutes of limitation did not bar a legal rentcharge, and therefore there was no bar in equity of an equitable rentcharge; *Stackhouse v. Barnston*, 10 Ves. 467; but such interests are expressly bound by the new statute, 2 Jo. & Lat. 195.

word importing the masculine gender only shall extend and be applied to a female as well as a male.

2. After this explanation, the statute enacts, that after the 31st of December 1833, no person shall make an entry or distress (*b*), or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action first accrued to the person making or bringing the same (*c*).

3. Tithes, by force of the 1st section, are included in the meaning attached to the word "land;" but although no tithes have been set out for twenty years, yet they do not fall within the 2d section, but may be recovered as *chattels* from the occupier; for in such a case nobody can be said to be in possession of the tithes: the occupier cannot be said to have dispossessed the tithe-owner. The word "land," in its proper sense, applies only to cases in which there are two parties, each claiming an adverse interest in the lands: so as to tithes, the operation of the statute is confined to cases where there are two parties, each claiming an adverse estate in the tithes: therefore a person who has received no tithes for twenty years, cannot recover the possession of them from another who has for twenty years received those tithes from

(*b*) Distresses are not limited by per Maule, J., 7 Com. Ben. Rep. 580.
the 3 & 4 Will. 4, c. 42; but they
are by the 3 & 4 Will. 4, c. 27; (*c*) Sec. 2.

the terre-tenant; and this leaves Lord Tenterden's act to apply to the tithes as a chattel (*d*).

4. Turnpike tolls do not fall within the description attached to the word "land," and therefore are not within the act (*e*).

5. But quarries and limestone land do come within that description (*f*).

6. Heriots are by section 1 included in the word rent; but it could hardly receive that construction where the render becomes due at uncertain intervals, nor could, it is conceived, the statute operate as a bar where the rent is payable at intervals greater than twenty years (a case however not likely to happen), for the meaning attached to certain words used in the act does not apply *where the nature of the provision* or the context of the act excludes such construction. The case of a heriot therefore would properly fall within the 2d section, unaffected by the other provisions in the act, none of which seems from the context to have been intended to include it; but it would be difficult to maintain that heriots, and such rents as we have just referred to, are wholly left out of the operation of the act (*g*).

7. Ejectment is now the common remedy, and twenty years the common period within which to bring it; and the twenty years run from the commencement of a man's own right to the possession, or if he claims through another, from that man's right to it: as to the latter, the expression of the act is "first accrued to

(*d*) Dean and Chapter of Ely *v.* Cash, 15 Mees. & Wels. 617; 3 & 4 Will. 4, c. 100; *infra*, sect. 8, pl. 12.

(*e*) Mellish *v.* Brooks, 3 Beav. 22.

(*f*) 3 Ir. Law Rep. 521.

(*g*) See Mr. Baron Parke's judgment in Owen *v.* De Beauvoir, 16 Mees. & Wels. 566; *infra*.

some person through whom he claims," and that is fully explained by the first section.

8. When it is ascertained with whom the right originated, the next inquiry is when, in the words of the act, it first accrued. This the legislature has specially provided for by enacting, that in the construction of the act the right to make an entry or distress, or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,)

First, as to possessions (*h*):—

1. When the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, *have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt*, then such right shall be deemed to have *first* accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received.

2. And when the person claiming such land or rent shall claim the estate or interest of *some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt*, then such right shall be deemed to have *first* accrued at the time of such death.

3. And when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be

deemed to have *first* accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument. All these provisions, with others relating to reversions, are comprised in the 3d section of the act.

9. These provisions apply to cases of estates in possession: where the party in possession is dispossessed, or discontinues such possession, the time runs from such dispossession or discontinuance, whether the claimant claims through some other person or not. Where the claimant derives his claim from another who is dead, but was in possession at his death and was the last in possession, the time runs from his death; and where the claim is originally or derivatively through an instrument *inter vivos*, where the possession was in the grantor, but ended with him, the time runs from the period when the claimant, or the person under whom he claims, became entitled to the possession.

10. Upon these enactments a question of great importance arose, viz., whether by pointing out when in the given cases the right shall be deemed to have first accrued, they excluded from the operation of the 2d section any case which was not provided for by the 3d section, or in other words, whether in such cases the twenty years would bar the right. There is no doubt but that the framers of the act thought that they had provided by the 3d section for every case that could occur. The point arose upon the claim of an annuitant under a will, who had never received any payment. It was at first held that the right was not barred by the lapse of twenty years. No annuity, it was observed, can be recovered by the 2d section unless within twenty years after the right of action

accrued, but that section must be construed by the third, which explains what is meant by the words "when the right shall first have accrued." But this case did not fall within either of the two first conditions, and not within the third, because gifts by will are expressly excepted (*i*). The act as it stood, therefore, was considered to have this singular operation, that if one half year's annuity had been received previously to the lapse of the twenty years, the annuitant would be barred for ever by non-payment during that period, whereas if he never once received the annuity, the statute does not operate to bar his claim, even after a lapse of time greater than twenty years (*k*).

11. But this construction was upon further consideration abandoned, and it was held that the 2d section contemplates and provides for the case where the right or title to the annuity itself is disputed; and the object of the 3d section is, to explain and give a construction to the enactment contained in the second clause, as to "the time at which the right to make a distress for any rent shall be deemed to have first accrued," in those cases only in which doubt or difficulty might occur, leaving every case which plainly falls within the general words of the 2d section, but is not included amongst the instances given by the third, to be governed by the operation of the second. A rent or annuity created by a will, falls therefore within the 2d section, and is not excepted out of it by the 3d section (*l*), and consequently the twenty years

(*i*) *James v. Salter*, 2 Bing. N. C. 505.

(*l*) *James v. Salter*, 3 Bing. N. C. 344.

(*k*) 2 Bing. N. C. 515.

would run from the period when the right to distrain for it first accrued.

12. The act in this respect is no doubt ambiguously framed, but the Court of Common Pleas, in arriving at its ultimate conclusion, seems to have increased the difficulty. After deciding that there were no words to directly exclude all instances except those enumerated in the 3d section, the Court observed, that the words "by any other instrument other than by will," carry the matter no further than if the 3d section had proceeded by attempting to enumerate every species of instrument by which an estate in land or rent could have been granted, and had omitted to mention a will, in which case the only inference that could be drawn from such omission would have been that the case, not being enumerated in the 3d section, fell back upon the general provision contained in the second. Indeed the Court added, unless this was held to be the true construction, the case which is likely to occur perhaps with the most frequency, viz., the devise of an [a particular] estate in possession in land, or of an estate in possession in a rentcharge first created by the will, would be altogether unprovided for by the statute. For the third class of instances enumerated in section 3, describes the grant to be "by a person being in respect of the same estate or interest [as was granted] in the possession or receipt of the profits of the land, or in the receipt of the rent," a description which could neither apply to the case of a devise of a particular estate in land, or of a newly created rent, for the deviser who has by his will carved an estate in land out of the estate whereof he was seised, can never be said to have been possessed in respect of *the same*

estate or interest as that claimed by the devisee, still less can the devisor who creates a new rentcharge by his will be said to have been in the receipt of the rent (*m*).

13. What the Court decided was, that the case did not fall within the 3d section, and therefore was left to the operation of the second. The framers of the act have not, it seems, executed their own purpose, for they no doubt intended to enumerate in the 3d section all the cases (not afterwards specially provided for) in which it would be necessary to ascertain when a right first accrued within the 2d section, for otherwise, as we shall presently see, the law of adverse possession would not be uniform. But if the criticism of the Court of Common Pleas be correct in regard to the language of the 3d section, which speaks of the *same estate or interest*, no case, although a grant within that section, and not a will, would fall within it, where a particular estate or a rent was created by it. And the preceding instance in the same (3d) section viz. where the person claiming shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt *in respect of the same estate or interest* until the time of his death, would require the same construction, and therefore could not extend to a devise where a particular estate in land or rent was created. The words are no doubt somewhat difficult to grapple with. But I should have thought that the true construction of the 3d section was this: the first clause embraces every case of an actual possession followed by a dispossession or discon-

(*m*) *Per* Tindal, C. J. 3 Bing. N. C. 553—555; *Doe v. Phillips*, 10 Adol. & Ell. N. S. 130.

tinuance of possession. The second includes those where the claimant derives title under a deceased person who was in possession till his death, when the possession was interrupted, and this would, in my view, have included the cases of both heirs and devisees where they were intruded upon. The third instance includes grants *inter vivos*, where the grantor was in possession, but possession has not been acquired by the grantee. The fourth refers to future estates, and applies to them, however created, whether by deed or will; and this was the opinion of the Court in the above-mentioned case, for the words "or other future estates or interests," were, they said, large enough to comprehend, and would comprehend all executory devises (*n*).

14. But it does not appear to have been thought that the case of a rent newly created by will, could fall within the second instance in the 3d section. In regard, however, to the language of the second and third instances in the 3d section, as the ancestor, devisor, or grantor, in the instances put, must have been in possession of the whole estate or interest out of which the particular estates, or the new rent (which stands upon the same footing) were created, the claimant might fairly be considered to claim, in the words of the second instance, "the estate or interest of a deceased person who continued in possession in respect of the same estate or interest until his death;" for the estate or interest which he does claim, is part of and derived out of that estate or interest; they are not distinct subjects, but the same subject differently modified, and they fall clearly within the intention of

(*n*) 3 Bing. N. C. 554; Doe *v.* Moore, 9 Adol. & Ell. N. S. 555.

the act (*o*). The expressions in the third instance are not distinguishable from those in the second; and where the receipt of the rent is spoken of, that seems to mean an existing rent prior to the grant, and does not affect the question as to a rent created by the instrument itself, which may be deemed an interest in the land.

15. The effect of section 2 is to put an end to all questions and discussions whether the possession of lands be adverse or not; and if one party has been in the actual possession for twenty years, whether adversely or not, the claimant whose original right of entry accrued above twenty years before bringing the ejectment, is barred by this section (*p*). This is certainly so when section 2 is governed by section 3; but we shall have occasion to consider whether cases within the 2d section, but unaffected by the 3d section, fall within the old law as to adverse possession, or are subject to the rule as to possession under the new law (*q*). When the possession is a bar under the statute, it may still properly be called adverse possession, although not in the old sense.

16. And although the conveyance is only by way of mortgage, yet the right to make an entry or bring an action falls within this section (*r*) as regards the land, although the right to recover the money falls within

(*o*) See the doctrine as to covenants entered into by lessees under powers running with the land, 2 Sugd. Pow. 452. In other instances in the act, the words "the same estate or interest" appear by the context to mean literally what they express.

(*p*) *Per Curiam*, 11 Adol. & Ell. 1015.

(*q*) *Infra*, sec. 4.

(*r*) *Doe v. Williams*, 5 Adol. & Ell. 291; *Wrixon v. Vize*, 3 Dru. & War. 104.

the 40th section; and notwithstanding that there is some variance between the 40th section and the 2d, 3d, and 14th sections of the statute, and the 1 Vict. c. 28, yet there is, it is said, the same restriction upon a suit for recovering the land as there is upon a suit for the recovery of the money (*s*). Where a mortgage deed was executed by the mortgagor only, and vested the legal fee in the mortgagee, subject only to redemption, on payment of the money at a future day, it was held, no interest having been paid, that the time under section 3 ran from the date of the mortgage against the mortgagee, and not merely from the day appointed for payment of the money, although the mortgagor's covenant for quiet enjoyment was in the usual terms that the mortgagee should and might, after default should happen to be made in the payment of the money or interest, enter and possess and enjoy the property, and the covenant for further assurance was in case of default in payment (*t*); but this is a very strict construction against the legal right.

17. It has been decided in the House of Lords (*u*) that the true construction of the old statute of limitations is that it bars those only who, having an *available* right of entry, have omitted during the statutable period of twenty years to exercise it, even where the party is estopped by his own act from entering; therefore, where a woman was tenant in special tail, and the reversion in fee was in her eldest son, the issue in tail, and she created a base fee in his favour, which it was ruled did not merge in his reversion in fee by

(*s*) 3 Dru. & War. 121.

(*t*) Doe v. Lightfoot, 3 Mees. & Wels. 553.

(*u*) Doe v. Woodroffe, 10 Mees.

& Wels. 608; 15 Mees. & Wels. 769; 2 House of Lords Cas. 811; compare 21 Jac. 1, c. 16, with the new statute.

reason of the estate tail, the son entered and suffered a recovery to himself in fee in his mother's lifetime, by which it was held *he had bound himself by estoppel*, and therefore his entry did not avoid the base fee, which continued till his death. It was also held that he had no available right of entry as heir in tail under the statute of limitation on the death of his mother, who died in his lifetime, but that the time began to run *at his death*, and not before, against the person then entitled to claim as issue in tail under the estate tail.

18. Although a man has been in possession twenty years as apparent owner, yet the rightful owner may show that the possession was not such as the statute will give effect to. Thus, where a widow and her only son, an infant, resided together on the property which had descended from the husband to the infant, and she married again, and her second husband lived with her son until 1805, when the latter, who was about twenty-one, left the premises, and the second husband acted as owner of the property; but the son occasionally resided two or three weeks at a time in the house, inhabited by the second husband and his wife, and so resided there at the death of his mother in 1841, and remained about three weeks after her death, and in 1842 the surviving husband procured the son, the heir-at-law, to execute a mortgage of the property, and the money was paid by the son to the husband, it was held in ejectment by the mortgagee against the husband that the former was entitled to recover, as the presumption was that the husband held as tenant at will to his son-in-law (*v*). The defendant said that he

occupied as apparent owner for twenty years. To this the reply was that the real owner came now and then and lived with him. Mr. Justice Patteson observed, that he did not say that a party having a legal title to an estate conveys it away by mere equivocal acts, which may amount to an admission of title in another. But here the defendant's title rested merely on the statute of limitations, and his acts might well amount to an admission, that during the period in question he was, in fact, tenant to another. We may observe, that the circumstance that the son-in-law acted as owner in raising money on the property at the request and for the benefit of the stepfather long after the period when time *per se* would have been a bar, was also entitled to great weight.

19. In *Doe v. Williams* (x), where the question was whether the possession of the mortgagor was adverse before the statute, and it was held according to the old law that it was not, Mr. Justice Patteson, during the argument, asked the counsel of the mortgagor whether he said that the possession was adverse as soon as twenty years had elapsed from the right accruing? Suppose, he said, interest had been paid on the mortgage regularly, the plaintiff, according to that construction, would nevertheless be barred. To this it was answered that the statute excepts the case of a written acknowledgment, and that the payment of interest was tantamount. The learned Judge added, that if the legislature meant to except the case of payment of interest, it was very odd that they did not do so in express terms; and in delivering judgment he said, how far, under the 3d section, it was necessary for the mortgagee to bring his

(x) 5 Adol. & Ell. 291.

action within twenty years *from the day of default*, he could not say; he did not see his way at all. If the 3d section was intended to comprehend the case of a mortgagee, it was very ill penned; and the 40th section, if meant to apply to actions of ejectment, was still worse penned.

20. These observations led to an enactment that it should be lawful for any person entitled to or claiming under any mortgage of land (being land within the definition of the 1st section of the former act) to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued (*y*). In this act it was not deemed necessary to point out when the right first accrued. By the 14th section of the first act an acknowledgment in writing within the terms of that section operates to make the time run only from that period, and the last act gives a like effect to the payment of any part of the principal or interest (*z*). Where the mortgagee is also tenant for life of the land, the statute does not begin to run against the right to the mortgage until his death; and it is said that the same rule applies where the mortgagee is one of several tenants in common of the land, for a tenant in common is entitled to receive the whole of the rent, subject to an account with his co-tenant. That view of the case is confirmed by the fact, that one tenant in common of the equity of redemption may redeem,

(*y*) 7 Will. 4 & 1 Vict. c. 23.

(*z*) 3 Dru. & War. 117—119.

which assumes that as against an incumbrancer one is entitled to the whole (*a*). In a case where the tenant for life under the will of the mortgagor of the equity of redemption, more than twenty years after his death, took an assignment of the mortgage in the name of a trustee, but there was no proof that any interest had been paid from the death of the mortgagor, and before the execution of the transfer; a recital in the transfer to which the tenant for life was a party, that the principal sum only remained due, *all interest for the same having been paid*, was held not to be a statement that any interest had been paid within twenty years. The Vice-Chancellor said, that suppose the fact was that for more than twenty years no interest had been paid during the life of the tenant for life, it then became a serious question whether, after the reversioner had obtained the benefit of the statute, it would be competent for the tenant for life to create a redeemable mortgage by her own act. The grossest fraud might be practised on tenant in remainder, as for a mere sixpence the tenant for life might sign an acknowledgment that no interest was due (*b*).

21. It may be thought, having regard to the general intention of the original act, as shown in sections 2, 3, 7, 14, and 40, that the above statutory provision was not necessary. It seems, however, still to have been considered an open point, whether a grantee of an annuity charged on land, whose annuity has been punctually paid, but the grantor has been in possession of the land, and has received the rents for twenty years without any

(*a*) *Wynne v. Styan*, 2 Phil. 303; *Per Cur. Hyde v. Dallaway*, 2 Hare, 528; see *Burrell v. Lord Egremont*, 7 Beav. 205.

(*b*) *Gregson v. Hindley*, 10 Jur. 383.

acknowledgment in writing of the grantee's title, is not barred of his right by the original act; and this case is not provided for by the later one (c). The statute clearly did not intend that time should run in such a case. The original relation of the parties is in no respect varied, and it would be singular if the regular discharge of the obligation should amount to a bar for the time to come. Every payment, on the contrary, is a submission to the incumbrance subject to which the estate is held. The grantee receives all his rights when his annuity is regularly paid: he can neither enter on the estate nor require the grantor to acknowledge his title in writing, yet it would be impossible to hold that because he regularly enjoyed his right, at the end of twenty years it must be barred by this statute (d). This is a stronger case in favour of the continuing right than the case of a mortgagee where the interest is regularly paid. The point seems to be free from doubt. It seems to have been decided in *Francis v. Grover* (e), where an annuity, which was held to be a charge only and not to create a trust, was given by a will to one for life and charged on all the testator's estates, which estates (charged with the annuity) were given to trustees to the use of certain persons. The acting trustee in possession of the estates paid the annuity from the death of the testator in 1808 until 1827. In 1829 a devisee of the beneficial interest attained twenty-one and entered into possession, and to a bill filed by the annuitant in 1844, for payment of the annuity out of the real estate, set up the statute as a defence. Wigram,

(c) *Searle v. Colt*, 1 You. & Col. C. C. 36; but this received no sanction from the Vice-Chancellor.

(d) See *Doe v. Beckett*, 4 Adol.

& Ell. N. S. 601; *M'Donnell v. M'Kinty*, *post*, pl. 22.

(e) 5 Hare, 39.

V. C., said that he thought the annuity was not barred by the statute. The annuity was paid in 1827 by the party who was then actually in possession or receipt of the rents and profits of the estate, not adversely, but according to the trusts of the will. He did not think there was any ground for saying that the annuity was barred. The payment up to 1827 was sufficient to take the case out of the statute.

22. "Discontinuance of possession," in the statute means an abandonment of possession by one person followed by the actual possession of another person, for if no one succeed to the possession vacated or abandoned, there could be no one in whose favour or for whose protection the act could operate. To constitute discontinuance there must be both dereliction by the person who has the right; and actual possession, whether adverse or not, to be protected (*f*). Therefore where a man had conveyed to another certain lands, reserving the mines, with a right of entry, it was held that the right was not barred simply by the omission to work them for twenty years. The grantee of the land enjoyed the lands, but the possession of the land was not the possession of the mines, which had become a distinct hereditament, and it was only by user of them, or by some unequivocal act of possession, that the rightful owner could have been dispossessed of them (*g*).

23. It has been held that the word "rent" in the 2d section, is confined to cases where an estate in the rent is claimed, and where the defendant sets up an adverse possession of the rent itself for twenty years

(*f*) 10 Ir. Law Rep. 526, *per* Cur.

(*g*) *M'Donnell v. M'Kinty*, 10

Ir. Law Rep. 514: the effect of user and possession of a part of the mines is there considered.

as an answer to the plaintiff's claim. The word "rent," it was observed, had an ambiguous meaning, being either the estate in the rent, or the rent reserved under a lease; and the Court held that in this section it was confined to the former meaning alone, and that a mere non-receipt of rent under a lease for more than twenty years did not deprive the lessor of his right to rent under the lease (*h*). In the 1st section of the act, the interpretation clause, the word rent is used in two senses, viz., in the sense of a rent charged upon land, and of a rent reserved under a lease; in the 2d section it is used in the sense of rentcharge only, and it is used in the same sense in the 3d, 4th, and 25th sections, and in the 7th section it is used in the same sense (*i*). The sense in which the word is used in the 8th and 9th sections we shall presently see.

24. Where under a lease of land for ninety-nine years a rent of 25 *l.* was reserved in the usual manner, and none having been paid for more than twenty years, the person in possession under the lease set up the statute as a bar to the landlord's right to distrain for any portion of the rent in arrear, it was held that the case did not fall within the statute; for the word "rent" in the 2d section has no reference to rents reserved on leases for years by contract between the parties, but is confined to rents existing as an inheritance distinct from the land, and for which before the statute the party entitled might have had an assize, such as ancient rent service, fee-farm rents, or the like. The Court considered that this would have been the true view even if the

(*h*) *Per Cur.* Dean and Chapter of Ely *v.* Cash, 15 Mees. & Wels. 622; Grant *v.* Ellis, 9 Mees. & Wels. 113; Sheil *v.* Incor-

porated Society, 10 Ir. Eq. Rep. 411.

(*i*) Doe *v.* Angell, 9 Adol. & Ell. N. S. 355, 356; *per Curiam.*

2d section had stood alone, but the subsequent parts of the statute strongly confirmed the correctness of this construction. The first case put in the 3d section is that of a party who has himself, *in respect of the estate or interest claimed*, been in possession of the rent, and who afterwards had been dispossessed or has discontinued the receipt of the rent. *The estate or interest claimed* must, according to the context, mean the estate or interest claimed *in the rent*, and not in the land out of which the rent issues. Now a person entitled to the rent reserved on a common lease for years has no estate in the rent at all: he is himself the freeholder of the land, and can therefore have no estate in rent issuing out of the land. And by the 42d section a limit is imposed as to the number of years' arrears for which a party entitled to rent may distrain, and there the subject matter to be recovered by the distress is described not as "rent," but as "arrears of rent." At the end of the ninety-nine years the reversioner would clearly be entitled to the possession of the land, for by one of the provisions of section 3 the right to the reversion is to be deemed to have first accrued when the estate falls into possession, unless, which was not the case here, some third person should in the meantime have got into wrongful receipt of the rents: as therefore his right to the reversion was preserved, his right to recover the rent incident to that reversion could not be deemed to be barred, for otherwise he might, by the dealing of the tenant wrongfully with another claimant, be barred of his right. The Court considered the 9th section as corroborating their view, and in this view the reversioner, by distraining for or otherwise obtaining his rent within twenty years after the first wrongful receipt of it by the adverse claimant,

might effectually prevent his being, by the wrongful act of another, deprived of the estate at the expiration of the term (*k*).

25. Section 2 fixes the period for land or rent from the time of such dispossession or discontinuance of possession, or at the *last time* at which any such profits or rent *were or was received*; but although the statute provides in the same sentence both for the case of land of which a party has been dispossessed, and for that of rent which he has ceased to receive, the sentence must be read not as giving in either case a choice, but *reddendo singula singulis*, *i. e.* fixing the actual moment of dispossession or discontinuance of possession as the point from which the twenty years are to run in the case of land of which a party has at some moment of time ceased to be in actual possession, and the last actual payment of rent as the point from which the twenty years are to run in the case of a party ceasing to receive rent (*l*). So that in the case of a rent the time will run from the last actual receipt of it, and not from the time when the first payment after such receipt became due (*m*). If a man is dispossessed of land he has a full term of twenty years from the time of his being dispossessed. But a person disseised of a rent has only twenty years from the last payment; and so if an annual rent has been paid on the day on which it became due, and is afterwards unjustly withheld, the party aggrieved has only nineteen years instead of twenty during which he can bring his action or distrain, for during the first

(*k*) *Grant v. Ellis*, 9 Mees. & Wels. 113; the above is an abridgment of the judgment as delivered by Rolfe, B.; *De Beauvoir v. Owen*, Excheq. Rep. 179, *infra*; *Crosbie v. Sugrue*, 9 Ir. Law Rep. 17.

(*l*) *Per Cur.* 16 Mees. & Wels. 564.

(*m*) *Owen v. De Beauvoir*, 16 Mees. & Wels. 547; 5 Excheq. Rep. 166.

year of the twenty it is plain that he has no right of distress or action (*n*).

26. It has been considered that this statute makes time a bar even against charities; but in most cases their rights would be saved under a later section (25), as in general charity estates are held under trusts, and whilst the right of the trustees remains unbarred, the interests of the charities cannot be affected by the trustees (*o*).

27. Where an estate is devised to trustees, and time has run against the heir, the filing a bill by a third person to have the trusts performed cannot of course preserve the rights of the heir adverse to the will; but although his rights as heir adversely to the will may be barred, yet in the suit he would be entitled to any portion of the property which in the events which have happened the trustees hold for the heir, as being undisposed of (*p*).

28. A person in possession (with or without title) may of course resist the claim of a party whose entry is barred by the statute (*q*).

29. Although when the time has once begun to run, the party to be affected cannot by any settlement create *new* rights (*r*), yet persons so claiming under him will have the same time to bring an ejectment as he himself would have had if he had continued alive,

(*n*) 16 Mees. & Wels. 565; *per* Parke, Baron. As the learned judge pointed out, this construction would prevail as to other branches of the act.

(*o*) See Incorporated Society *v.* Richards, 1 Dru. & War. 253; Attorney-General *v.* Persse, 2 Dru. & War. 67; Commissioners of

Char. Don. *v.* Wybrants, *infra*, n. to s. 24, s. 25.

(*p*) Simmons *v.* Rudall, 1 Sim. N. S. 115.

(*q*) Holmes *v.* Newlands, 11 Adol. & Ell. 44; 3 Adol. & Ell. N. S. 679.

(*r*) Stackpoole *v.* Stackpoole, 4 Dru. & War. 320.

and remained owner of the estate. Therefore, where at the period possession was taken upon which time was to operate, the estate stood limited to one for life, with remainder to her sons successively in tail, with remainders over, and by a settlement and recovery the tenant for life and her only son resettled the estate under which the son became tenant for life in remainder, with remainder to his issue in tail, with remainder to his sister for life, with remainders over, and he died without issue, and before his remainder fell into possession, and his mother died in 1822, it was held that the sister could maintain an ejectment within twenty years from 1822; for the effect of the recovery and resettlement was to bar all remainders over and to create new estates out of the son's estate tail, and therefore the persons who took such estates had the same time that he had, viz., twenty years from 1822 (*s*). Where a man by his will creates particular estates and remainders, and then mortgages his estate, of course he and his devisees have only in common the allotment of time to claim against the mortgagee in possession, and the will cannot give to the devisees successive rights (*t*).

30. The third provision of the 3d section, coupled with the 2d section, has been held to apply to a term of years assigned to a trustee to attend the inheritance, where of course the trustee is not in possession, so that the twenty years would run against him from the time when he became entitled to the possession. In the case in which this was decided (*u*), there had been no demand of possession before ejectment brought. Patteson, J., observed, that he would not say the words

(*s*) *Doe v. Edmonds*, 6 Mees. & Wels. 295.

(*t*) *Browne v. Bishop of Cork*, 1 Dru. & Wal. 700.

(*u*) *Doe v. Phillips*, 10 Adol. & Ell. N. S. 130.

of the 3d section were specially pointed to the case of trustee and *cestui que trust*, but they certainly seemed to be very applicable. Now if the termor could have brought ejectment within twenty years before this action was brought, there was an end of the case. The 3d section seemed clear, and there was nothing in any other part of the act to militate against their construction of it. Coleridge, J., added, that to sustain this action it must be conceded that the termor might sue without demand of possession. Then the 2d section, with which the 3d section, as being explanatory of it, was to be read, seemed to embrace this very case, inasmuch as the right of entry first accrued beyond the period limited.

31. The point was not, however, fairly raised in the case of *Doe v. Phillips*, because no demand of possession had been made; and considering the case to fall within the 2d section, and the branch relied upon of the 3d section, if the trustee of the term could recover without a demand, it was manifest, as pointed out by the Court, that he might have recovered, without any previous demand, more than twenty years before the action brought; and in that view his action was too late. It was not decided that the *cestui que trust* was not tenant at will to his trustee, nor was it even decided that the demand of possession would not determine the will. Indeed it appears that the plaintiffs were trustees for infants, and that both the trustees and the *cestuis que trust* had been kept out of possession for more than twenty years by the uncles and aunts of the latter, and that the case fell properly within the 12th section. If, as Maule, J., subsequently observed, not barred in twenty years, they

never would be (*x*). It seems to have been a case in which both trustee and *cestui que trust* were barred.

31*a*. In a later case (*y*), where upon a writ of dower the tenant pleaded an outstanding term, the Court of Common Pleas held that in the case of an attendant term, the *cestui que trust* was tenant in will to his trustee, unaffected by the 7th section, and that whilst the estate at will remained, the statute did not operate; and this seems to be the better opinion. Wilde, C. J., in delivering the opinion of the Court, observed that the general object of the act seemed to have been to settle the rights of persons adversely litigating with each other, not to deal with cases like that of trustees and *cestui que trust*, where, although there are two parties, one only is interested, and that the party beneficially entitled. The term having been assigned to attend the inheritance, the assignee became trustee, and the purchaser *cestui que trust* during the term; the *cestui que trust* entering into possession of the land, he was, at law, tenant at will of the trustee. By sect. 2, it is enacted that no person shall make an entry, or bring an action to recover any land, but within twenty years next after the time at which the right to make such entry or bring such action first accrued. The right of entry as between landlord and tenant accrues on the expiration of the tenant's term, if he has a term. If a tenant at will, the right of entry, in the terms of this section of the act, would naturally be understood to accrue upon the determination of the tenancy at will. It might be said indeed,

(*x*) See 8 Com. Ben. Rep. 242, 253; see and consider 8 Adol. & Ben. Rep. 231; 13 Jur. 871.
 Ell. N. S. 158, n.

as in the case of a tenancy at will, the lessor may at any time determine his will by entering ; that a right of entry exists at all times from the commencement of the estate at will, and is not dependent on a previous determination of the estate. But the Court thought that the term "right of entry," in the 2d section, ought not to be so construed. The right which a lessor has in such a case is a right to determine the tenancy at will ; and it is only on the determination of the tenancy at will that there is such a vested right of entry as is in the contemplation of the 2d section of the act. This view appeared to be confirmed by the proviso of the 7th section respecting tenancy at will, which provides in cases of ordinary tenancy at will, that the right to make an entry "shall be deemed to have first accrued either at the termination of such tenancy or at the expiration of one year next after the commencement of such tenancy." The object of that section obviously was to fix a definite period after the commencement of the tenancy at will, beyond which the tenancy shall not be presumed to have had a continuance, a provision which would have been wholly unnecessary if the right of entry, within the meaning of the 2d section, had at all times existed from the very commencement of the estate at will. But passing from the 2d to the 3d section of the act, it was contended that the present case fell within that clause of the 3d section which we have just stated. But the Court did not think that this case, of a *cestui que trust* holding possession of lands under a trustee, fell within this clause, which was meant to apply to cases where the person holding the land does not hold it under, or in privity with, the person in

whom the right of entry is supposed to be. A *cestui que trust* in such case holds possession under the trustee, and under the protection of an instrument by which the estate is conveyed to the trustee. It could not, therefore, be said that it was a case in which no person entitled under the instrument had been in possession, for the *cestui que trust* had been virtually in possession under the instrument (1). The provision in the 7th section respecting trustees appeared to the Court to reflect light on the nature of their estate, and on the provisions of the 2d and 3d sections, as far as their estate is concerned. The object of that section appeared to be to fix a definite period, at the end of which the right of entry of the lessor was, as against the tenant at will, to be deemed to have accrued ; and it provides, that no *cestui que trust* shall be deemed to be a tenant at will within the meaning of that clause, which was equivalent to saying that the right of entry of the trustee, as against the *cestui que trust*, should not be deemed to have first accrued from the expiration of one year next after the commencement of the tenancy ; and therefore the exception seemed to have been introduced in order to prevent the necessity of any active steps being taken by the trustee to preserve his estate from being destroyed, as in the case of an ordinary tenancy at will by mere lapse of time. The intention appeared to be to put the estate of the trustee

(1) This seems to refer to the assignment of the term to attend : the possession of the *cestui que trust* might be deemed the possession of the assignee of the term, but the assignment was not made "by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land" (see sect. 3), but by a person who never had been in possession.

in a *better* state, in this respect, than that in which the estate of an ordinary lessor was as against his tenant at will ; whereas his situation would be worse than that of an ordinary lessor, on the construction contended for, for the time of limitation contended for would run, as against the trustee, from the commencement of his estate ; whereas as against an ordinary lessor, the time would only run from the actual determination of the tenancy, or from the end of the first year's tenancy. This well considered view of the statute is not now of much importance as to attendant terms, but it is of great importance with reference to other cases.

32. In the case of *Young v. Lord Waterpark* (z), where a term of years created by a marriage settlement to raise portions was considered as still in existence, it was held that it could not be objected to a suit by the children for the portions that they were bound under the 40th section, to which our attention has not yet been called, because the trustee did not hold adversely to them, but for them. It should be kept in view that this case did not decide that time may not run against both the trustees of the term and the *cestuis que trust*, but there are not many cases it is apprehended in which such a defence could be maintained.

33. If a man have a power of re-entry under a lease upon non-payment of rent, and no payment of rent be made for 20 years, during which time he has not re-entered, he cannot re-enter afterwards and maintain an ejectment during the lease (a), although as we have seen, his right to recover the possession at the end of

(z) 13 Sim. 204 ; 10 Jur. 1.

(a) *Doe v. Bingham*, 3 Ir. Law Rep. 456. The defendant was the lessee under a lease granted in

1796 : no rent had been paid, and in 1805 he purchased from a person claiming adversely to the lessor.

the lease will not be affected by the mere non-payment of rent (I).

34. After providing, as we have seen, in three events for estates and interests in possession, the 3d section proceeds to provide when time shall be held to first accrue in regard to reversionary and future interests (*b*).

4. When the estate or interest claimed shall have been *an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest*, then such right shall be deemed to have *first* accrued at the time at which such estate or interest became an estate or interest in possession (*c*). And the words, “or other future estates or interests,” are large enough to comprehend, and would comprehend, all executory devises (*d*).

5. And when the person claiming such land or rent, or the person through whom he claims, shall have become entitled *by reason of any forfeiture or breach of condition*, then such right shall be deemed to have *first* accrued when such forfeiture was incurred or such condition was broken.

35. But section 4 provides that when any right to make an entry or distress or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition, shall have *first* accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or

(*b*) Sect. 3, *supra*, p. 18.

(*d*) *Per* Tindal, C. J., 3 Bing.

(*c*) See *Doe v. Edmonds*, 6 Mees. N. C. 554.

& Wels. 295.

(I) One learned judge thought this a startling state of things if such were the law; 3 Ir. L. Rep. 463. In this case, according to Alderson, B., the judges in fact controverted *Doe v. Oxenham*, though they are reported to have stated otherwise; 16 Mees. & Wels. 560, 561; see *post*, pl. 40.

bring an action to recover such land or rent shall be deemed to have *first* accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened (*e*).

36. And a right to make an entry or distress or to bring an action to recover any land or rent shall be deemed to have *first* accrued, in respect of an estate or interest *in reversion*, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time *previously to the creation of the estate or estates which shall have determined*, have been in possession or receipt of the profits of such land, or in receipt of such rent (*f*). So that the remainder-man is not bound to enter for a forfeiture until his estate fall into possession, nor is the right of a reversioner affected by a possession by him, or any person through whom he claims, previously to the creation of the estate which shall have determined.

37. But several rights in the same person may, contrary to the old rule, be barred without any new allowance. For when the right to make an entry or distress, or bring an action to recover any land or rent to which any person may have been entitled for an estate or interest in possession is barred by the lapse of time, and such person shall *at any time during the said period* have been entitled to any other estate, interest, right

(*e*) Sect. 4: this of course applies like the other provisions to equitable rights; 2 Phill. 125, *infra*, s. 6 of this chapter.

(*f*) Sect. 5.

or possibility, in reversion, remainder or otherwise, in or to the same land or rent, no entry, distress or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right or possibility, *unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession (g).*

38. Where rent reserved by a lease, although amounting to 20 *s.* or upwards, has been simply withheld for 20 years, the lessor, the reversioner, would, as we have seen, be entitled to recover the land on the determination of the lease. This clearly was the intention of the act, and the intention is shown by the provision in the 9th section giving effect to a payment of rent by a lessee to a person wrongfully claiming the reversion (*h*). In *Grant v. Ellis* (*i*) the Court of Exchequer thought that the remedy was under the 4th clause of the 3d section, relating to estates and interests in reversion and remainder. Now that clause provides that when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession. If in this clause profits of the land included the rent of it, and rent had been received by the lessor, the rever-

(g) Sect. 20.

(h) 9 Mees. & Wels. 126.

(i) 9 Mees. & Wels. 113, *supra*.

sioner, in respect of his estate, although the payment of it to him was discontinued, it might be doubted whether the case we are considering would fall within that branch of the 3d section. But although profits should include rent, yet if the clause in question is to be read as referring to the period when the reversion or remainder falls into possession, which view is assisted by the terms of the 5th section, then the case would clearly fall within this clause, for neither possession nor receipt of profits would have been obtained in respect of the estate in possession. But profits do not seem to include rent before the reversion or remainder falls into possession.

39. In the case of *Grant v. Ellis* already referred to, the Court observed (*j*) that it was not unworthy of notice that throughout the act the receipt of rent is constantly mentioned in a mode which appears as if studiously designed to mark that the rent contemplated is not the ordinary rent reserved on leases for years; not that which is usually spoken of as the *rents and profits*, but something distinct from both. For instance, in the 3d (*k*) section the language is, "*Where the person claiming such land or rent shall have been in possession, or in receipt of the profits of such land, or in receipt of such rent:*" and the same, or nearly the same, mode of expression is used throughout the act. This, the Court added, is certainly not the ordinary mode of speaking of a person in actual possession of land, or in receipt of the rents received on leases for years. They did not rely very much on this argument, but the circumstance they said was worth adverting to. It appears to be a circumstance entitled to great attention. The frame of the act

(*j*) 9 Mees. & Wels. 123.

(*k*) It is the 2nd in the report: probably a misprint.

fully justifies the opinion of the Court. In the first section of the act no meaning is assigned to the word profits, and the meaning assigned to the word rent was not intended to include rents reserved on leases (*l*); but of course that word would receive its ordinary signification where the nature of the provision or the context of the act shows that it was used in that sense; for example, the 8th section, relating to tenancies from year to year or other period, without a lease in writing, speaks of the last time "when any rent payable in respect of such tenancy shall have been received;" and section 9 provides for the case of a lease in writing, "by which a rent amounting to the yearly sum of 20 s. or upwards shall be reserved, and the rent reserved by such lease shall have been received" wrongfully, and throughout leaves no room for doubt that the rent referred to is a rent reserved by lease, whether the lease be of land or rent [charge]. And in both of these sections, and also in section 7, relating to a tenancy at will, the *tenant* is spoken of as a person "in possession or in receipt of the profits of any land," or in receipt of any rent [charge]. It is clear therefore that the expression, "in receipt of the profits of any land," is used in the act, in conjunction with the words in possession of the land, to denote not the receipt of rent from a tenant, but the receipt of the actual proceeds of the land; and they were no doubt introduced to prevent any question arising where the owner, although he received the proceeds, did not actually occupy the land (*m*). This use of the word profits explains the meaning of the 35th section, which enacts that the receipt of the rent payable by

(*l*) See and consider 9 Mees. & Wels, 128. (*m*) See 1 Jo. & Lat. 31.

any tenant from year to year, or other lessee, shall as against such lessee, or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of the act. The framers of the act appear to have been apprehensive that the tenant being in the actual receipt of the profits of the land, as that term was used in the act, might claim adversely to the lessor, who received the rent only. On the other hand, they guarded the tenant's lease against the landlord's claim, on the ground that the receipt of the rent was to be deemed a receipt of the profits of the land. It is no doubt a singular provision. The question could only arise between the tenant and the person receiving the rent; and the receipt of it is made binding only against such lessee, or any person claiming under him. Had the clause been general, it would in every case, as regarded the purposes of the act, have made a payment of rent to a wrongful claimant binding. As the clause stands, such a payment binds the lessee; and the act itself, in section 9, provides where such a payment shall bar the rightful owner of the reversion.

40. The right to recover at the end of the term, where the rent has been simply withheld, was established in the case of *Doe v. Oxenham*, where a lessee for years depending upon lives, at an annual rent of 38 *l.*, agreed with the lessor to allow him to make certain improvements, and the lessor agreed that the lessee should not be called upon for payment of the rent during the lease—at the expiration of the lease—twenty years having elapsed since the payment of any rent—the lessee set up the statute in bar of the lessor's ejectment, and insisted that the case fell within

the former breach of the 3d section, relating to the discontinuance of possession or receipt; but it was held clearly that the case fell within the fourth branch of the 3d section; and the 9th section, the Court thought, threw light upon the subject. There had been no adverse claim; it was the mere case of a landlord omitting to compel his tenant to pay the rent reserved by his lease. The right of the lessor manifestly accrued on the determination of the lease, and he was entitled to bring his action at any time within twenty years from that period (*n*). Where there has been a payment to a wrongful claimant of the reversion, if the rent amount to the yearly sum of 20*s.* or upwards, under a lease in writing, the case will fall within the 9th section (*o*).

41. Where a lease in writing is made at no rent, or at one under 20 *s.*, it does not fall within the 9th section, which we shall presently consider; and the lessor may recover the land within twenty years of the cesser of the lease, although the rent has been paid to a wrongful claimant for twenty years before the expiration of the lease (*p*), for in this case, according to the old law, which is left to operate on it, the receipt of rent is no ouster.

42. The operation of the 5th and 20th sections was fully considered in the case of *Doe v. Mouldsdale* (*q*). An estate was devised for three lives to W. Jones, his heirs and assigns, who devised it to his wife Ann Jones, her heirs and assigns, for the lives, and she in 1793 conveyed it for valuable consideration to her

(*n*) *Doe v. Oxenham*, 7 Mees. & Wels. 131, vide *infra*; *Doe v. Bingham*, 3 Ir. L. Rep. 456; *Crosbie v. Sugrue*, 9 Ir. L. Rep. 17; *sup.*, 42, n.

(*o*) *Infra*.

(*p*) *Infra*; 7 Mees. & Wels. 132; 4 You. & Coll. 467.

(*q*) 16 Mees. & Wels. 689.

second son, Richard Jones, his heirs and assigns, for the lives, with a proviso that the estate should revert to her, her heirs and assigns, if he should have no child living at his death. In 1811 Richard Jones purchased the reversion in fee, which was accordingly conveyed to him (I). He died in 1812 without issue, leaving Lewis Jones his nephew and heir at law. On Richard's death without a child, of course the lease for lives reverted to the heirs of Ann, who had died in 1819. At the time of Richard's death in 1812 Lewis Jones was Ann's heir as well as Richard's, and was therefore entitled to the estate for the lives *in esse*, but he did not take possession of the property, which was enjoyed by other persons. In 1835 the last of the three lives died, and the person who was then heiress at law both of Lewis Jones and Richard Jones, brought an ejectment, and it was held that her right was barred. The Court observed, that by section 3, the title of Lewis Jones, as heir of Ann, would be deemed to have accrued when it became an estate in possession, that is, at the death of Richard without a child then living. By the 5th section, his right to the reversion as heir of Richard (supposing he had no other title) accrued at the end of the term in 1835. The Judges thought that this section applied to those cases only *where another person than the termor* (II) *was the reversioner*. This, they said, appeared from the 20th section. In the case before the Court in the

(I) A question was argued, whether the lease for lives had merged by the accession of the reversion in fee in the same person, but the Court found it unnecessary to decide that point. The question of merger was much considered in *Creagh v. Blood*, 3 Jo. & Lat. 133.

(II) This means the person entitled to the lease for lives : throughout the judgment the estate of the lessee is called the term.

meantime the land had not been recovered by any person, and consequently Lewis Jones's right in respect of his estate in possession having been barred by the determination of the period of twenty years from 1812, the right of the person claiming through him was barred also.

43. In an earlier case (*r*), where copyholds were limited to the husband and wife for their lives, with remainder to the husband in fee, and he absconded in 1805, and was made a bankrupt in 1807, and the bargain and sale was executed in that year, his wife upon his absconding occupied and continued in the occupation during her life, which endured for more than twenty years, the assignees were allowed to recover upon her death for her husband's remainder, was held to be a future estate within the 3d section. And if the 20th section applied to this case, the qualification at the end of it applied also; because the wife was in possession till her death, and though she had not recovered the possession by legal proceedings, it was a sufficient *recovery* for the purposes of that section if she had been in possession during the whole period of her life. The Court thought that, independently of the bankruptcy, the husband was entitled during the joint lives of himself and his wife, and that upon his death his wife was entitled for her life, and the heirs of the husband upon the expiration of the joint lives. Now in this view we may observe, the property belonged to the assignees upon the bankruptcy, which took place in 1807; the husband went abroad in 1805, and was never afterwards heard of. The wife therefore held the estate in possession in

(*r*) Doe v. Livversedge, 11 Mees. & Wels. 517.

opposition to the title of the assignees till her husband's death, which when seven years expired in 1812 might be considered as proved, although the lapse of the seven years would not prove the exact time of his death, and still less that such death took place at the end of seven years (*s*). Upon his death she became entitled under the limitations, but there was no change of possession or other act done. The case did fall within section 3, but it does not seem to have been within the 20th section, for the right of the assignees to recover the estate in possession was not barred "by the determination of the period" limited by the act, inasmuch as twenty years had not elapsed after the bankruptcy, and before the period when the bankrupt's death would be considered as proved.

44. It is somewhat difficult to understand the provision at the conclusion of section 3, and that in section 4, regarding forfeiture and conditions broken, or the provision in section 5 as to reversionary rights. The last head of section 3 provides, that when the person claiming the land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition broken. Now this section applies as well to cases where the claimant has no title except in consequence of the neglect or misfeasance of the party in possession—*e. g.* in the case of a condition broken where the whole fee has been disposed of subject to the condition—as to cases where the claimant has an actual estate in the land or rent in reversion or remainder; and section 4, there-

(*s*) *Doe v. Nepean*, 2 Barn. & Adol. 36; 2 Mees. & Wels. 394.

fore, upon the ground that a man should not be compelled to take advantage of a forfeiture or of a condition broken, properly gives a new right to the reversioner or remainder-man where he has not already recovered, when his estate becomes an estate in possession, just as if no such forfeiture or breach of condition had happened. Section 4, therefore, is a modification of the last provision in section 3. The 5th section is confined to *reversions*, and provides that the right shall be deemed to have first accrued in respect of an estate in reversion at the time at which it shall become an estate in possession by the determination of any estates in respect of which the lands shall have been held, “ notwithstanding the person claiming such land, or some person through whom he claims, shall at any time *previously to the creation of the estates which shall have determined*, have been in possession of the land.” Now this provision does not seem to have any connexion with section 4, or with the last clause of section 3, nor do I understand why it was inserted, for it does not seem possible to contend that any portion of section 3 rendered it necessary. The only portion of that section which by any ingenuity could be supposed to render the qualification necessary, is the first (*t*) ; but that enacts, that when the person claiming, or some person through whom he claims, shall *in respect of the estate or interest claimed* have been in possession, or in receipt of the profits, &c. and shall, *while entitled thereto*, have been dispossessed or have discontinued such possession or receipt, then the right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the

(*t*) See 1 Hayes' Conv. 255.

last time when any such profits or rent were or was received. This provision is carefully confined to possession of the estate or interest claimed, which under section 5 must be the reversion. But no one could be in possession of the reversion before it existed, and it could not exist before the creation of the particular estates, and, therefore, the possession of the owner as such before the creation of the particular estates could not possibly affect him under section 3, as the *reversioner* under the settlement after those estates had determined, but his right would properly fall within the fourth division of section 3. The distinction may be a thin one, but there appears to be one between this first clause of section 3 and that upon which the Court of Common Pleas observed in *James v. Salter* (*u*). Section 5, as we have seen, applies only to a reversioner who has no particular estate. The case of a reversioner who has also a particular estate falls within section 20. If section 5 had not been inserted in the act, both cases would have fallen within section 2, and the case of a mere reversioner would have been governed by the 4th clause of the 3d section, whilst that of a reversioner entitled also to a particular estate would have been governed by the 20th section. The special provisions as to certain tenancies, to which our attention will presently be drawn, prescribe the time when the right to enter shall in those cases be deemed to arise, and they should be constantly kept in view.

45. An administrator is to be deemed to claim as if there had been no interval of time between the death

(*u*) *Supra*, pl. 13, 14, p. 22, 23.

of the deceased person and the grant of the letters of administration (*v*).

46. The act contains the following special provisions in regard to the possession of tenants, and provides in other cases where one man's possession shall or shall not enure to the benefit of others.

47. When any person is in possession or in receipt of the profits of any land, or in receipt of any rent, as *tenant at will*, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent will be deemed to have *first* accrued *either* at the determination of such tenancy, *or* at the expiration of one year next after the commencement of *such* tenancy, at which time such tenancy will be deemed to have determined (I); but it is provided that

(*v*) Sec. 6; see *Holland v. Clark*, 1 You. & Col. C. C. 170.

(I) The 7th section was framed chiefly for the purpose of protecting the possession of small patches of land taken from commons, &c., of which the parties might have been allowed to remain in possession without interruption for a long period, but of which it would be difficult to prove the commencement of the holding. The reasonable construction, therefore, is, that in any event the right of action shall accrue *ultimately* at the end of a year from the commencement of the tenancy, though it may accrue sooner by the actual determination of the will. *Arguendo*, 7 Mees. & Wels. 232. The section, however, has a much wider application. It seems to be assumed in this section that no rent is paid; for in the next section (8), which provides for the case of a tenant from year to year, or other period, without any lease in writing, the right is first to accrue at the determination of the first of such years, or at the last time when any rent payable shall have been received (*which shall last happen*); and see s. 35. Where a tenant originally at will continues in possession, paying a yearly rent, a tenancy from year to year would in most cases be created. In *Pope v. Garland*, 4 You. & Coll. 399, Alderson, B., said that a tenant at will at a *yearly rent* is a tenant from year to year.

no mortgagor or *cestui que trust* shall be deemed to be a tenant at will within the meaning of this clause to his mortgagee or trustee (*x*), and which proviso has been held to apply only to express trusts (*y*). The words, "within the meaning of this clause," should not be lost sight of, for the provision is not that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will to his mortgagee or trustee, but that none shall be deemed such within this provision; and therefore, as we have already seen, a *cestui que trust* has been held still to be a tenant at will to his trustee under the general provision in this act (sect. 2 and 3), and time will not run until the tenancy is regularly determined (*z*).

48. In this section, as we have seen, the word rent is used in the sense of rentcharge only: the words are, "where a person shall be in possession, or in receipt of any rent as tenant at will." Now a tenant at will of *land* out of which a rent is *reserved* cannot by any possibility of language be said to be in receipt of that rent which he *pays*; he cannot be tenant at will of the land, and of the rent also: indeed no one can be said to be tenant of or to have any estate in the rent reserved by a lease (*a*).

49. In *Doe v. Carter* (*b*), Patteson, J., doubted whether there can *now* be a continuous tenant at will. There may be a new one every year. The statute, s. 7, considers tenancy at will as determining at the end

(*x*) Sec. 7. *Doe v. Thompson*, 5 Adol. & Ell. 532; *Doe v. Thompson*, 6 Adol. & Ell. 721; *Doe v. Rock*, 4 Mann. & Gran. 30; and see 10 Adol. & Ell. N. S. 132, 133.

(*y*) See 4 Mann. & Gr. 32.

(*z*) *Garrard v. Tuck*, 3 Com. Ben. Rep. 231; vide *supra*, p. 38.

(*a*) *Doe v. Angell*, 9 Adol. & Ell. N. S. 355, 356; *per Curiam*.

(*b*) 9 Adol. & Ell. N. S. 867.

of one year after its commencement. To this it was answered from the bar that that was for the purpose of the twenty years' limitation; but the learned Judge said that it seemed to be for all purposes. The provision, however, can hardly be deemed a general one. Mortgagors and *cestuis que trust*, as we have seen, are expressly excepted out of it; but in other cases the true construction appears to be, that *as regards the bar created by the statute*, the section gives a right of entry at the determination of the tenancy at will at any time within a year after its commencement, but at all events, at the expiration of a year from its commencement (c). Mr. Justice Patteson observed, in a previous case, that if a new tenancy is to be inferred from the mere holding of a tenant at will, the statute never could apply at all as to cases of tenancy at will (d); but it would be a question for a jury, whether the parties had by a fresh agreement, express or implied, created a new tenancy at will (e).

50. It was attempted under this section to maintain that a tenant at will who had been twenty years in possession, but whose possession had determined by his death before the act passed, had acquired the fee by force of the act, so that his heir could recover in ejectment against a person having no title (the widow of the tenant at will); but this was overruled (f), although it was admitted that the case would have been quite different if the tenant at will had continued in possession.

(c) See 5 Adol. & Ell. N. S. 771; 9 Adol. & Ell. N. S. 560.

(d) 9 Adol. & Ell. N. S. 558.

(e) Doe v. Turner, 7 Mees. & Wels. 226; 9 Mees. & Wels. 623.

(f) Doe v. Thompson, 6 Adol. & Ell. 721; Doe v. Page, 5 Adol. & Ell. N. S. 767.

51. The provision is a general and continuing one, and is not confined to cases existing at the time the act passed, although it applies to them. A continual possession, therefore, by a tenant at will, partly before and partly since the act, or wholly after the act, will, if it endure twenty-one years after its commencement, vest the fee-simple in the tenant at will, for the remedy of the owner will not only be barred, but his estate extinguished.

52. Although the seventh section is not retrospective (*g*), yet it applies where there has been no express act done to determine the tenancy at will up to the time of passing the statute. Therefore where the jury found that a man's daughter and her husband, who had occupied his property without paying any rent (*I*) for upwards of thirty years, including the period when the statute passed, held as tenants at will, and not adversely, this was held to be a bar by the seventh section, coupled with the second; and as neither the owner nor his devisee availed himself of the five years allowed in such a case by the statute, the right was barred (*h*).

53. And where a purchaser of the fee not having paid all the purchase money, was let into possession, and therefore became tenant at will to the seller, and he let his son into possession as tenant at will without paying any rent, and the son died within twenty-one years of his entry, and his wife entered and occupied till the expiration of twenty-one years from her hus-

(*g*) *Doe v. Page*, 5 Adol. & Ell. N. S. 767; *Doe v. Bold*, 11 Adol. & Ell. N. S. 127.

(*h*) *Doe v. Moore*, 9 Adol. & Ell. N. S. 555; see *Doe v. Groves*, 10 Adol. & Ell. N. S. 486.

(*I*) The father himself paid the taxes, but this was not held to vary the case, 9 Adol. & Ell. N. S. 561.

band's entry, it was held that the right of the father, the purchaser, was barred, for a tenant at will may create a tenancy at will as against himself; and it was ruled that this tenancy in his son was not affected by a subsequent conveyance of the fee to the father, nor by a mortgage afterwards by the father, of which the mortgagee had not given any notice to the tenant, although of course his own estate at will was determined (*i*).

54. But in a like case, where a husband had occupied for eighteen years, and his wife for thirteen years after his death, and being dispossessed she brought ejectment, it was held that she could not recover, because her husband's possession showed *prima facie* a seisin in fee, and as he left children her title was defeated (*k*).

55. So where a purchaser was let into possession without a conveyance or payment of the purchase money, and was considered to be tenant at will to the sellers, and he built and agreed to sell to a third person, but continued in possession for several years, and died leaving a widow, to whom he devised all his real estate, and she entered and received the rents for fifteen years and then died, and the contest was between her devisees and the devisee of the sub-purchaser, who twenty-two years after that purchase had obtained a conveyance of the fee from the original sellers—the ejectment was brought by the devisee claiming under such conveyance exactly twenty years after the burial [it did not appear when he died] of the first purchaser. The jury found that *no tenancy at will had been created be-*

(*i*) Doe v. Carter, 9 Adol. & Ell. N. S. 863.

(*k*) Doe v. Barnard, 9 Adol. & Ell. N. S. 868, n.

tween the original sellers and the widow of the first purchaser, and it was held that this was correct; for in order to constitute a tenancy at will something must be done by the lessor, and there was no evidence to show that she claimed under her husband, consequently the ejectment was too late. The widow's entry, therefore, was not considered as a continuation of the tenancy at will which existed between the sellers and her husband; she therefore held as against and not under them. And it was held, that although by the rule of equity a vendor is a trustee for the purchaser, yet this case was not that of a trust within the proviso in the 7th section, which does not apply to constructive trusts (*l*).

56. Where the tenancy at will is by the act of the landlord converted into a tenancy by sufferance, still the twenty years must be computed from the expiration of the first year after the commencement of the original tenancy at will; but if a new tenancy at will be created between the parties, then the twenty years will be calculated from the expiration of the first year of such new tenancy (*m*).

57. If there was a tenant at will who paid the rent up to the time of the reversioner's death, and the reversioner devised to *A.* for life, remainder to *B.*, *B.* might maintain ejectment on *A.*'s death, although no rent was paid during *A.*'s life (*n*).

58. As we have already seen, a man's *acts* during his occupation may amount to an acknowledgment that he is tenant at will, and therefore where a stepfather

(*l*) *Doe v. Rock*, 4 Mann. & Gran. 30.

Doe v. Carter, 9 Adol. & Ell. N. S. 363.

(*m*) *Doe v. Turner*, 7 Mees. & Wels. 226; 9 Mees. & Wels. 643;

(*n*) *Per Patteson, J.*, 9 Adol. & Ell. N. S. 557.

occupied for twenty years as apparent owner, but the stepson, the real owner, went now and then and lived with him, it was ruled that this submission showed that he held as tenant at will during the whole of the period (o).

59. In a case before referred to, where a man's daughter and her husband were tenants at will under him without rent, and twenty years had elapsed, but the father-in-law after the statute, but before the five years allowed by section 15 had elapsed, devised the land to his daughter for life, with remainder to another in fee, and gave to his daughter an annuity charged on another estate, although the five years had not elapsed at the father's death, and the son-in-law received the annuity, it was held in ejectment after the daughter's death, by the devisee in remainder, that the wife could not be taken to have entered within the five years as against her own husband, and to have clothed herself with the life estate under the will, and that her husband could rely on his occupation under the tenancy at will, and was not precluded by his receipt of the annuity (p).

60. When any person is in possession or in receipt of the profits of any land, or in receipt of any rent as *tenant from year to year or other period, without any lease in writing*, the right of the person entitled subject thereto, or of the person through whom he claims to make an entry or distress, or to bring an action to recover such land or rent, will be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent pay-

(o) Doe v. Groves, 10 Adol. & Ell. N. S. 486, *supra*, pl. 13, p. 26.

(p) Doe v. Moore, 9 Adol. & Ell. N. S. 555, *supra*, pl. 52, p. 57.

able in respect of such tenancy shall have been received (which shall last happen) (*q*). The great distinction between this section and section 9 should be kept in view.

61. In this the 8th section, the sense of rentcharge only must be given to the word rent in the earlier part of the section, but at the close of it the word is manifestly used in the other sense, viz. that of rent reserved, the words being, “or at the last time when any *rent* payable in respect of such tenancy shall have been received” (*r*). This section is retrospective, and the effect of the act is to make a parliamentary conveyance of the land to the person in possession after the period of twenty years has elapsed (*s*).

62. A rent service (not pecuniary), *e. g.* sweeping out a parish church, is within this section (*t*). But keeping a grindstone on land for the use of the parishioners is not a rent within the statute, and therefore the person holding the land may maintain his title to it under the statute, although he has kept the grindstone which has been used by the parishioners (*u*).

63. By the statute of frauds a lease by parol cannot exceed three years; but where a tenant from year to year continues in possession paying rent, a new tenancy springs up every year, and the lessor's right under this 8th section is renewed accordingly (*x*). A parol admission by a party that he is paying rent is binding

(*q*) Sec. 8.

(*r*) *Per Curiam*, 9 Adol. & Ell. N. S. 336.

(*s*) *Doe v. Sumner*, 14 Mees. & Wels. 39; see 9 Adol. & Ell. N. S. 359.

(*t*) *Doe v. Benham*, *Doe v.*

Billetts, 7 Adol. & Ell. N. S. 976, 983.

(*u*) *Doe v. Hinde*, 2 Mood. & Rob. 441; see 7 Adol. & Ell. N. S. 978. Denman, C. J., had ruled that the keeping of the grindstone

was a rent.

(*x*) *Tomkins v. Lawrence*, 8 Car. & Pay. 729.

within this section, and the case does not fall within the 14th section (y).

64. And when any person is in possession or in receipt of the profits of any land, or in receipt of any rent [charge] by virtue of *a lease in writing, by which a rent amounting to the yearly sum of 20 s. or upwards shall be reserved* (I), and the rent reserved by such lease shall have been received by some person *wrongfully claiming to be entitled to such land or rent* [charge] *in reversion immediately expectant on the determination of such lease*, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent [charge] subject to such lease, or of the person through whom he claims, to make an entry or distress or to bring an action after the determination of such lease, will be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; *and no*

(y) Doe v. Beckett, 4 Adol. & Ell. N. S. 601.

(I) Another rule is, that in case of a lease, adverse possession so as to bar the reversioner does not commence till the expiration of the term. Where rent is reserved on a lease, we consider it more reasonable that the limitation should run from the time when the rent began to be received by a person claiming adversely, so that there shall not be a new period of limitation from the expiration of the term. The receipt of rents and profits is equivalent to the occupation of the soil; the person who is in receipt of them can do nothing more to establish his right, and the person to whom they are denied is virtually dispossessed. *Where no rent, or only a nominal rent, is reserved, very slight negligence can be imputed to the reversioner in merely not requiring a recognition of his title from the tenant; and in such cases, till the expiration of the lease, we think there should not be a commencement of adverse possession to bar the landlord.* Any rent less than 20 s. a year may, for this purpose, be considered nominal. 1st Report on Real Property.

such right will be deemed to have first accrued upon the determination of such lease to the person rightfully entitled (2) (I). Here therefore the time runs from the period at which the rent was first so received by the person wrongfully claiming as aforesaid ; but to give effect to a payment to a wrongful claimant, it is necessary that he should be a person wrongfully claiming “to be entitled to the land or rentcharge in reversion immediately expectant upon such lease,” and also that no payment should afterwards have been made to the person rightfully entitled thereto.

65. If my tenant under a lease paid to a stranger, I might, under the old law, treat that as a forfeiture, or wait till the lease expired ; but now, by section 9, payment to any other is an adverse possession by such other, and if I wait I lose my action (a). In this section the word “rent” is used seven times. The first time it means rentcharge ; the second and third, rent reserved ; the fourth, rentcharge ; the fifth, rent reserved ; the sixth, rentcharge ; the seventh, rent reserved (b). This section is retrospective (c).

66. In *ex parte Jones* (d), it was contended upon the construction of this section, that there was no adverse possession in a lease except by adverse payment of rent ; but the Lord Chief Baron said that, in his opinion, if a landlord granted a lease subject to rent, and the party paid no rent, that would be adverse possession as well

(2) Sect. 9 ; see *Doe v. Oxenham*,
7 Mees. & Wels. 131, *supra*, pl. 40,
p. 47.

(a) 9 Adol. & Ell. N. S. 341 ; *Per*
Patteson, J. ; see p. 349, 358, 359.

(b) *Id.* 356 ; *per Lord Denman*,
C. J.

(c) *Id.* 359.

(d) 4 You. & Coll. 466.

(I) The words in the text between crotchets are said to give the true meaning of the section ; 9 Adol. & Ell. N. S. 356, 357.

as if the lessee paid rent to another person ; but he added, that where no rent was reserved the statute would not apply. The non-payment of rent under a lease however does not, as we have seen, operate adversely : such is not the old law, and there is no such enactment in the statute. It has accordingly been held that the right to recover possession of land subject to a lease accrues not from the time when any person dealing with the leases, or dealing with those who are entitled to the leases, gets possession and claims to be entitled in fee, but from the time when the person claiming under a lease pays rent to a party claiming wrongfully in reversion immediately expectant upon such lease, for then the adverse title of the person who receives the rent under such circumstances is first really brought into operation against the party who claims on the expiration of the lease (*e*). When the rent is thus paid to a person receiving it wrongfully the time begins to run, and no right first accrues upon the determination of the lease by the express words of the statute (*f*). Where the rent is simply not paid, we have seen that the lessor's right to recover the land within 20 years after the determination of the lease is not barred (*g*).

67. Where the render for mines is in specie, the time runs from the last receipt of the produce, and not from the time of converting it (*h*).

68. Where a man purchased, subject to a long lease at 4*l.* per annum, and also subject to an annuity of 4*l.*,

(*e*) *Chadwick v. Broadwood*, 3 Beav. 308.

(*f*) *Doe v. Angell*, 9 Adol. & Ell. N. S. 328 ; *Grant v. Ellis*, 9 Mees. & Wels. 113.

(*g*) *Doe v. Oxenham*, 7 Mees. & Wels. 131 ; *Crosbie v. Sugrue*, 9 Ir. Law Rep. 17.

(*h*) *Denys v. Shuckburgh*, 4 You. & Coll. 42.

and had not received the rent or been in possession for twenty years, but the tenant had every year paid the annuity to the annuitant, the latter insisted that the payment was a payment of rent to him, and that it showed that he held adversely to the landlord; but the jury, under the direction of the Judge, and with the approbation of the Court above, found a verdict in ejectment for the latter, on the ground that the payment was in consequence of an arrangement that the tenant should pay the annuity due from the landlord, instead of paying the same sum to the latter as rent, although there was no evidence to that effect (*i*). It is a point which perhaps ought not to have been considered open to doubt, for although in a certain sense the rent was paid to the annuitant, yet that was to prevent circuity of payment, and the annuitant who received his precise annuity could not repudiate his rightful claim, and simply because the rent was of the same amount,—for which very reason the payment to him was made directly by the tenant,—change his character, and insist that he filled that of landlord, and that the payment to him was the evidence of it.

69. Where the payment of rent within twenty years is proved against the tenant to the lessor, though a person claiming under the lessee is in possession, and has paid no rent, that is immaterial, for an under-tenant cannot be permitted to dispute a title which is valid against the person of whom he holds (*j*).

70. No person is to be deemed to have been in possession within the meaning of this act, merely by reason

(*i*) *Doe v. Gopsall*, 4 Adol. & Ell. N. S. 603, n.; 5 Jur. 170, nom. *Doe v. Godsill*.
(*j*) *Doe v. Beckett*, 4 Adol. & Ell. N. S. 601.

of having made an entry (*k*); and continual or other claim is, as we have seen, no longer operative (*l*).

71. And when one or more of several persons entitled to any land or rent, as coparceners, joint tenants or tenants in common, have been in possession or receipt *of the entirety or more than his or their undivided share or shares* of such land, or of the profits thereof, or of such rent for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons (*m*). This sets at rest an important point constantly arising between such owners, and it operates by relation back from the first commencement of the separate possession (*n*); and although the legal estate is vested in a trustee for several persons as tenants in common, yet if some have been for twenty years in the possession of the whole, or received the profits thereof, through their agent, and the trustee has taken no step, that would constitute a clear title under the statute to the whole in the persons who have thus enjoyed the property (*o*); and now an entry by one coparcener is not an entry of both, for the statute makes the possession of one coparcener no longer the possession of the other (*p*).

72. Where under certain settlements two persons

(*k*) Sec. 10.

(*l*) Sec. 11.

(*m*) Sec. 12.

(*n*) *Culley v. Taylerson*, 3 Per. & Dav. 539; 11 Adol. & Ell. 1008; *Doe v. Horrocks*, 1 Car. & Kir. 566; *Burroughs v. McCreight*, 1 Jones & Lat. 290; *ex parte Ha-*

sell, 3 You. & Coll. 617: see 16 Mees. & Wels. 712.

(*o*) *Burroughs v. McCreight*, 1 Jo. & Lat. 290.

(*p*) *Doe v. Woodroffe*, 10 Mees. & Wels. 608; 15 Mees. & Wels. 769; 2 H. of L. Cas. 311.

had each an equitable interest in a separate but not divided one-fourth of some mines, and the interest of one in her one-fourth *ceased on the death of a third person*, and went over to the owner of the other one-fourth, but she had another one-fourth in another right, and continued in receipt of the produce of her own and of the settled one-fourth, that is, of two-fourths, just as if her interest in one had not ceased, and her co-tenant in common continued to receive the produce of his original one-fourth only, and this arose from mistake, and not from arrangement or from fraud, it was held that this was not an adverse possession of the one-fourth share which had gone over, unless it could be contended that every tenant in common receiving more than his share must be considered as in adverse possession of the surplus so received by him; but this could not be maintained. Both parties had a right to receive, and did during all the time receive, a share in the rents and profits as tenants in common. Then the case fell expressly within the statute of Anne, which gives in such cases an action of account against the co-tenant in common who has received more than his share; and when an action of account will lie, a bill for an account may be sustained, but the equitable relief, it was held, must be governed by the rule given by the statute at law as its guide (*q*). But although this case, having regard to the extent of the relief given and the circumstances, seems to have been rightly decided, yet it should be kept in view that the statute expressly provides a bar where one tenant in common has been in possession or receipt of the entirety, *or*

(*q*) *Denys v. Shuckburgh*, 4 You. & Coll. 42.

more than his undivided share of the land, or of the profits thereof, for his own benefit.

73. And the possession or receipt by the younger brother or other relation of the heir, is not to be deemed the possession or receipt of the heir himself (*r*).

74. But when any *acknowledgment of the title* of the person entitled to any land or rent has been given to him or his agent *in writing* signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then *such possession or receipt of or by the person by whom such acknowledgment has been given will be deemed to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment has been given at the time of giving the same*, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress or bring an action to recover such land or rent will be deemed to have first accrued at the time at which such acknowledgment, or the last of such acknowledgments was given (*s*).

75. It is for the Judge and not for the jury to decide whether a writing amounts to an acknowledgment of title within the statute (*t*). A letter written in answer to a claim for rent, which in effect is an admission that rent was due, will be an acknowledgment of the title of the claimant (*u*). If two parties are dealing

(*r*) Sec. 13; *Scott v. Nixon*, 3 Dru. & War. 383.

(*s*) Sec. 14; see *Doe v. Edmonds*, 6 Mees. & Wels. 295; *De Beauvoir v. Owen*, 5 Exch. Rep. 173. As to an acknowledgment of a judgment debt in Ireland, after 3 Geo. 1, c. 4, and before the 3 & 4 Will. 4, c. 27; see Lord

Cloncurry's case, 3 Jo. & Lat. 537.

(*t*) *Doe v. Edmonds*, 6 Mees. & Wels. 295, where, at the trial, the question had been left to the jury; and see 1 Dru. & War. 290.

(*u*) *Furdon v. Clegg*, 10 Mees. & Wels. 572; see the cases on ss. 23, 40, and 42.

with each other, the one claiming a right to the property and the other only an incumbrance on it, the incumbrancer cannot be heard to say that an acknowledgment contained in a correspondence between them is not binding on him, in case some third person were to make a claim to the property (*v*). Deeds accepted by a grantee may be evidence that he claims under and not against the grantor; they may amount to a direct acknowledgment of the grantor's title, so as to prevent the grantee's title from being adverse (*x*). The acknowledgment is expressly required to be in writing (*y*), signed by the person in possession or in receipt of the profits, but it may be given to the person entitled, or his agent (*I*). But a parol admission by a person that he is paying rent to another, and by the person in possession that he is tenant to the person making the

(*v*) Incorporated Society *v.* Richards, 1 Dru. & War. 290.

(*x*) Lewis *v.* Thomas, 3 Hare, 26.

(*y*) Inc. Soc. *v.* Richards, *ubisup.*

(1) Section 14, relating to acknowledgment of title, requires the acknowledgment to be given to the person entitled, or *his agent*, in writing, signed by the person in possession or in receipt of the profits.

Section 23 bars the right to redeem after 20 years' possession by the mortgagee, unless in the meantime an acknowledgment of title shall have been given to the mortgagor, or some person claiming his estate, or to *his agent*, in writing, signed by the mortgagee, or the person claiming through him.

Section 40, relating to charges upon land, &c., gives effect to an acknowledgment of the right given in writing signed by the person by whom the same shall be payable, or *his agent*, to the person entitled thereto, or *his agent*.

And section 42, relating to arrears of rent or interest, in like manner gives effect to an acknowledgment of the same in writing given to the person entitled thereto, or *his agent*, signed by the person by whom the same was payable, or *his agent*.

In all four cases, therefore, the acknowledgment is binding if given to the party entitled, or *his agent*; but an acknowledgment of title or of a right to redeem cannot be given by an *agent*, whilst in the cases of money charges, and of arrears of rent or interest, an acknowledgment by an

admission, may be relied on, without having resort to this section of the act (z) (1).

76. It is provided by the act that when no such acknowledgment shall have been given before the passing of the act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of the act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years before limited shall have expired, make an entry or distress or bring an action to recover such land or interest (which word interest, which is in the Parliament Roll, appears to be a mistake for rent) (a), at any time within five years next after the passing of the act (b), which provision, although very

(z) *Doe v. Beckett*, 4 Adol. & Ell. N. S. 601.

(a) *Doe v. Angell*, 9 Adol. & Ell. N. S. 360.

(b) Sec. 15; see *Doe v. Thompson*, 5 Adol. & Ell. 532; *Doe v. Williams*, *ib.* 291; *Doe v. Thompson*, 6 Adol. & Ell. 721; *Nepean v. Doe*, 2 Mees. & Wels. 894; *ex*

parte *Hasell*, 3 You. & Coll. 617; *Holmes v. Newlands*, 11 Adol. & Ell. 44; 3 Adol. & Ell. N. S. 679; 3 Per. & Dav. 128; *Culley v. Taylerson*, 3 Per. & Dav. 539; 11 Adol. & Ell. 1008; *O'Sullivan v. McSwiney*, 1 Long. & Town. 111; *Wrixon v. Vize*, 3 Dru. & War. 104.

agent will be effectual. See ss. 28, 40, 42, *infra*. Lord Tenterden's Act, 9 Geo. 4, s. 1, required the acknowledgment to be signed by the party chargeable thereby; and it was held that an acknowledgment signed by an agent was inoperative: *Hyde v. Johnson*, 2 Bing. N. C. 776; see *Grenfell v. Girdlestone*, 2 You. & Coll. 676.

(1) In *Howcutt v. Bonser*, 3 Excheq. Rep. 491, a recital of a mortgage in a deed to which the mortgagee was not a party was held not to be necessarily an acknowledgment of the debt within the 5th section of 3 & 4 Will. 4, c. 42. The recital would be quite true, even though the mortgagee should have been in possession of the property, and should out of the rents have satisfied himself, his debt and interest. A trust in the deed to pay off all mortgages was held to amount to nothing, having no reference to any particular mortgage.

material to the right understanding of the act, has now ceased by the lapse of the five years to have any direct operation.

II. Of savings in cases of disabilities.

77. If at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent first accrues as aforesaid, such person is under any of the disabilities hereinafter mentioned (that is to say,) *infancy, coverture, idiocy, lunacy (c), unsoundness of mind, or absence beyond seas*, then such person, or the person claiming through him, may, notwithstanding the period of twenty years before limited has expired, make an entry or distress, or bring an action to recover such land or rent at any time within *ten years* next after the time at which the person to whom such right *first* accrued as aforesaid ceased to be under any such disability, or died (which shall have first happened) (*d*).

78. But no entry, distress or action can be made or brought by any person who at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent first accrued, shall be under any of the disabilities before mentioned, or by any person claiming through him, but within *forty years* next after the time at which such right first accrued, although the person under disability at such time has remained under one or more such disabilities during the whole of such forty years, or although the term of ten years from the time at which he ceased to be under any such disability, or died, has not expired (*e*); nor although the person under a disability

(c) See *Fulton v. Creagh*, 3 Jo. & Lat. 329; 3 You. & Coll. 620.

(d) Sec. 16.

(e) Sec. 17; *Doe v. Bramston*, 3 Adol. & Ell. 63; *infra*, s. 4; *Fulton v. Creagh*, 3 Jo. & Lat. 329.

dies without having ceased to be under such disability, is any time beyond the period of twenty years, or the period of ten years, to be allowed by reason of any disability of any other person (*f*); or, in other words, a succession of disabilities does not extend the time (I).

79. We have already seen that in the case of a rent-charge or the like, the time runs, under the 2d section and the first clause of the 3d section, from the last time when the rent was received, and not from the period when the rent could have been distrained for. Against this construction, the 16th section, which we are now considering, which saves the rights of persons under disabilities, was relied upon. In considering this objection, the Court observed that the clause was made to operate only where the party intended to be protected was under disability at the time when the right to make the distress or bring the action first accrued; and if this were held to be the time when the last payment was made, the protection would in many cases be wholly illusory. Put the case, for instance, of a party regularly receiving his rent up to a given day, and becoming lunatic before the next day of payment arrives, if he should by reason of his lunacy omit

(*f*) Sec. 18.

(I) Section 18 enacts, that when any person shall be under any of the disabilities before mentioned at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent beyond the said period of twenty years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent shall have first accrued, or the said period of ten years next after the time at which such person shall have died, shall be allowed by reason of the disability of any other person.

to enforce payment of his rent for twenty years, it would seem on all principle that he must have been intended to be protected ; but certainly, as he was not under disability at the last time of payment, he would not come within the protection of the 16th section. Many other similar cases might be pointed out. This was no doubt a very serious defect, and would afford strong grounds for adopting any reasonable construction of the 3d section, by which it might be remedied. But no construction would have that result ; for even if by a forced and difficult construction of the sixth (*g*) branch of the section, they were to hold that the point of time there designated was not the last actual payment, but the time when the rent first fell in arrear, yet the very same difficulty would exist in all the other cases pointed out by the statute, namely, the case of a person dying seised, and leaving an heir not under disabilities, but who should become disabled before any rent has accrued due ; and the case of a person claiming under a settlement, who may be a feme sole when her title accrues, but may be under coverture before she has any title to distrain or sue for rent ; and so as to the other cases provided for by the 3d section. The same thing might be said of the 8th section. For these reasons, though the Judges of the Court of Exchequer were fully sensible of the incongruities of the case, yet they felt bound to act on the plain and natural construction of the language of the 3d section (*h*). The decision, it will be observed, turned wholly on the 3d section, and the 16th section was only relied upon in argument with a view to the

(*g*) The section referred to is the third, and the branch of it intended to be referred to is the first, and not the sixth.

(*h*) *Owen v. De Beauvoir*, 16 Mees. & Wels. 567, 568.

true construction of the former section. In the Exchequer Chamber this decision was affirmed; and referring to the objection raised on the 16th section, that Court observed that the inconvenience of a person coming under any disability after the receipt of rent, and before the right of action, &c. accrued, was strongly pressed, and was indeed more substantial [than the objection on the 3d clause]; but it was to be observed, that the Legislature in passing this act had in a much more important instance (?) left the rights of persons under disability unprotected, inasmuch as section 42, which bars the recovery of arrears after six years, had no proviso in favour of such persons. The circumstance therefore of their not being perfectly protected by the 16th section did not afford a ground for presuming against a construction which involved that consequence (*i*).

80. In the course of the argument in the Exchequer, Alderson, B., observed, that if they took the literal and plain construction of section 2, they should escape from the difficulties in which section 3 would plunge the case with reference to the savings for disabilities (*k*). It is much to be regretted that this view was not adopted. In favour of the clear intention, this construction seems to have been open to the Court. If a case within the 2d section should not fall within the 3d, there clearly the 16th section would operate only from the time at which the right to make an entry or distress or to bring an action first accrued. The words do not seem to be too powerful to be struggled with where the case is within both the 2d and 3d

(*i*) *De Beauvoir v. Owen*, 5 Exch. Rep. 182.

(*k*) 16 Mees. & Wels. 561.

sections. In such cases the 3d section prescribes the period when the right shall be deemed to have first accrued, in order to fix the time when the 20 years' bar shall commence, and that would still operate in the given case, although the 16th section should receive a limited construction. Now the 2d section forbids any person to prosecute his right but within 20 years after the time at which the right to enter, distrain, or sue shall have first accrued. Leaving therefore the 3d section to provide in certain but not in all cases when the 20 years shall begin to run, we may pass on to the 16th section, which enacts, that if at the time at which the right of any person to make an entry, &c. "shall have first accrued as aforesaid," such person shall have been under any of the disabilities enumerated, he may, notwithstanding the 20 years shall have expired, prosecute his right within 10 years after he shall have ceased to be under a disability, &c. Now here the time spoken of is not with reference to the time allowed, but with reference to the incapacity of the person entitled at the time at which his right to make an entry or distress, or to sue, first accrued as aforesaid. Why should not this refer, as it was no doubt intended to do, to what it expresses, the time when his right to enter, &c., first accrued, or in other words, to the 2d section, instead of to a period when he had no such right, which is arbitrarily appointed by the 3d section for a distinct object. Omitting altogether the 3d section, the construction would admit of no doubt. Leaving to that section its manifest object to operate upon, still the construction would not be open to any serious difficulty. As there are cases within the 2d section which are held not to be within the 3d section,

so there may be cases within the latter section as far as its professed object is concerned and yet not governed by it, where a contrary intention can be collected from the context of the act, and no actual violence is done to the words. It is observable that the subsequent sections 17 and 18 both speak generally "of the person who at the time at which his right to make an entry, &c., first accrued" shall be under any of the disabilities before mentioned. If the Courts should feel themselves at liberty to adopt this construction when the point calls for a decision, not only would the intention of the legislature be effected and a real protection be afforded to persons under disabilities, but the 16th, 17th, and 18th sections would in all cases have the same operation instead of having different operations, according as a case may be within both sections 2 and 3, or within the former and not within the latter.

81. No part of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjoining to any of them (being part of the dominions of the Crown), is to be deemed to be beyond seas within the meaning of the act (*l*).

82. It seems to have been held that this provision is applicable to cases of residence in Ireland before the passing of the act, where the controversy arises subsequently to the act (*m*).

83. The provision in section 20 should be kept in view, because it bears upon *all* the important sections already considered. Where the right to an estate in possession is barred, the right of the same person to any other interest is also barred, unless in the meantime some person entitled to an estate limited after the

(*l*) Sec. 19.

(*m*) *Ex parte* Hasell, 3 You. & Coll. 617.

estate in possession shall have recovered (*n*). The enactment applies only to such other estate, interest, right, or possibility, whether in reversion, remainder, or otherwise as the person barred shall be entitled to at any time during the period required to bar the estate in possession, so that no interest acquired after that bar has taken effect would be affected. Of course the interest recovered by another person which would prevent the bar, must necessarily be an estate intervening between the estate in possession and the estate in remainder, &c., of the person whose estate in possession has at all events been barred.

(*n*) *Supra*, pl. 37.

SECTION IV.

OF ADVERSE POSSESSION.

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| <ol style="list-style-type: none"> 1. <i>Report of commissioners.</i> 2. } <i>Doe v. Williams: what is ad-</i> 3. } <i>verse possession.</i> 4. { <i>Doe v. Bramston: husband and</i> 7. { <i>wife out of possession for</i> <i>forty years.</i> 8. <i>Possession by tenants at will, or</i>
 <i>without lease in writing.</i> 9. <i>Acknowledgment of title.</i> | <ol style="list-style-type: none"> 10. <i>Danger of time running where</i>
 <i>possession is not adverse.</i> 11. <i>Lease in writing.</i> 12. <i>Tenancies at will and at suffer-</i>
 <i>ance.</i> 13. <i>Rents and particular estates.</i> 14. <i>Forty years not a perfect bar.</i> 15. <i>Imperfect conveyance by husband</i>
 <i>and wife.</i> 16. <i>Jumpson v. Pitcher.</i> |
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1. THE real property commissioners observe in their first report (*a*), that great practical difficulty has arisen in determining what is adverse possession, and when

(*a*) Page 47: the last case upon adverse possession before the statute is *Doe v. Millett*, 11 Adol. & Ell, N. S. 1036.

it shall be considered to have begun. This must generally, they add, be left as a question of fact for a jury; but there are some rules of law, *præsumptiones juris et de jure*, which absolutely prevent the possession from being considered adverse, and the expediency of which is very questionable, as they do not seem necessary for preserving rightful claims, and they greatly impair the healing tendency of the statutes of limitation. One of these rules, they observe, is, that a possession which began rightfully cannot be considered as having become wrongful,—that is, adverse as against the rightful owner,—by being merely continued after the right of the party in possession has determined (I). It appeared to them that it should be open to a jury to find that adverse possession began from the determination of the rightful estate of the party.

2. There is no direct provision in the act as to adverse possession, nor is the expression used except in some sections, which we shall presently consider (*b*), and except in the 15th section, which, as we have seen, saved for five years the right of a party existing at the time the act passed, where the possession or receipt of the profits of the land *should not have been adverse to the right or title of the person claiming to be entitled thereto*, although the twenty years allowed by the act should have expired; and several cases were saved by this provision; the possession, although long, not having been adverse (*c*).

(*b*) Sections 30, 31, 33.

Adol. & Ell. 721; see 9 Sim. 575;

(*c*) Doe v. Williams, 5 Adol. & Ell. 291; Doe v. Thompson, *ib.* 532; and see Doe v. Thompson, 6

11 Adol. & Ell. 51; 1 Dru. & War. 289; *ex parte* Hasell, 3 You. & Coll. 617.

(I) This, I apprehend, was not the law.

3. It was observed by Mr. Justice Patteson, in *Doe v. Williams* (*d*), that from the language of the 15th section it plainly appears that *something or other* was, after the act passed, to be considered as adverse possession, which was not so before the act passed; for in that section it seemed to be considered that the possession which, up to the passing of the act, was not adverse as the law then stood, would, by the operation of the act, become so on the very day after the act passed, and that by relation; otherwise the provision as to the five years was not needed to protect the right of the party against whom such adverse possession might be set up.

4. And where a woman seised in fee in possession, married, and she and her husband continued in possession for some years after the marriage, but more than forty years before the commencement of the action they left the place, and did not afterwards exercise any act of ownership, or occupy the estate, and the wife died in 1828, and the husband in 1832, and her eldest son brought an ejectment in 1835, it was held that he was barred by the statute (*e*). The Court observed, in delivering judgment, that the fact being clear that within the terms of the 3d section of the statute, the plaintiff's mother was dispossessed or discontinued the possession or receipt of the rents above forty years before the action, the action was clearly barred by the 17th section. Some argument was raised on the question whether the possession was adverse or not, but the terms of that clause are unequivocal, and one of its objects was to avoid the necessity of inquiring into

(*d*) 5 Adol. & Ell. 297; and
vide *post*, pl. 5.

Ell. 63; *qu.* whether the case
did not fall within the 15th sec-

(*e*) *Doe v. Bramston*, 3 Adol. & tion.

facts of so ancient a date. *If*, the Court added, *the persons actually in possession could be shown to have held under him through whom the plaintiff claimed, the possession of the former might be regarded as the possession of the latter*, but in this case there was not a single fact from which such an inference could be drawn; on the contrary, the departure of the former possessors to a distance without appearing to have received any rent or made any demand, was the strongest evidence of their intending to abandon at once all occupation and all claim of ownership. The facts of the husband's tenancy by the curtesy and the son's right of possession not accruing till after his father's death, were held to furnish no answer to the positive enactment of limitation in the seventeenth clause. Finally, the Court observed, that it was true that in several previous cases the Court showed a strong indisposition to presume a possession adverse which might be lawful, consistently with the facts found: of those cases no more need be said on that occasion than that they were not brought within the late statute.

5. This, therefore, is a direct decision that forty years' possession, although not adverse in the sense of that expression under the old law, will gain a title. The judgment is perhaps not altogether consistent, for it was said that if the possession could be shown to have been held under the person through whom the plaintiff claimed, it might be regarded as the possession of the latter, which really is the doctrine of non-adverse possession (*f*); but the rest of the judgment

(*f*) See *Doe v. Harbrow*, 3 Adol. & Ell. 67, n.; *Doe v. Edgar*, 2 Bing. N. C. 498: see the sense attributed to this expression in 13 Sim. 333, 334.

shows that the Court meant to decide that "adverse possession" was not necessary. And this is established to be the true principle by the case of *Nepean v. Doe*, in the Exchequer Chamber (*g*), where the Court were all clearly of opinion that the 2d and 3d sections of the act have done away with the doctrine of non-adverse possession, and that, except in cases falling within the 15th section, the question is whether twenty years have lapsed *since the right accrued*, whatever be the nature of the possession.

6. And in a later case (*h*) the Court of Queen's Bench observed, that the effect of the 2d section was to put an end to all questions and discussions whether the possession of lands, &c. be adverse or not; and if one party has been in the actual possession for twenty years, whether adversely or not, the claimant whose original right of entry accrued above twenty years before bringing the ejectment is barred by this section.

7. The framers of the act do not appear to have followed out their own views as contained in the observations before quoted, and they have left the point of adverse possession to be settled by the construction of the act. The 2d section, which makes the twenty years a bar, does not touch the question, but speaks generally of the right to make an entry or distress. The 3d section, however, which professes to state when that right shall be deemed to have first accrued, places it altogether upon possession or receipt of the profits: in the first instance there put, the right commences at the time of dispossession or discontinuance

(*g*) 2 Mees. & Wels. 894.

(*h*) *Culley v. Taylerson*, 3 Per. & Dav. 539.

of possession, or at the last time at which any profits were received, and the other instances are of similar import. The 17th section, which makes forty years a bar even where there have been or are disabilities, depends, as far as this question of adverse possession is concerned, upon the previous provisions. The 3d section makes non-possession or non-receipt of the profits the commencement of the bar, then certain allowances are made for disabilities, but the time is not extended beyond forty years (*i*).

8. As possession or receipt of profits is thus made necessary to prevent time from running against the owner, it became necessary to lay down some rule as to the occupation of tenants, particularly of tenants at will. This was accomplished, as we have seen, in the case of possession by a tenant at will, by making the right of the person entitled subject thereto, to bring an action or make an entry or distress, to commence either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy is to be deemed to have determined: which makes the time run, at the latest, at the expiration of such one year (*k*). And this provision applies, as we have seen, not merely to the case, not a very usual one, of an actual letting at will, but to various cases in which one man obtaining possession of another's estate, is held to be a tenant at will, but of course it does not extend to the cases of mortgagors and *cestuis que trust*, which are expressly excluded from its operation. In the case of a tenant from year to year, or for any other period without any lease in writing, the time runs from the determination

(*i*) *Scott v. Nixon*, 3 Dru. & War, 388.

(*k*) Sec. 7.

of the *first* of such years or other periods, or at the last time when any rent shall have been received, which shall *last* happen (*l*). But the receipt of rent payable by any tenant from year to year or other lessee, is, as against such lessee or any person claiming under him (but subject to the lease), the receipt of the profits of the land within the act (*m*).

9. An acknowledgment of title in writing makes the possession of the person making the acknowledgment the possession of the person to whom it is made, but the time will run from the period at which such acknowledgment or the last of such acknowledgments, if more than one, was given (*n*).

10. These provisions place landed proprietors in danger of rapidly losing portions of their property, particularly where they have allowed friends or dependants to occupy parts without payment of any rent. In many such cases the statute will be found to have transferred the fee simple to the occupier. Where twenty years have not already elapsed, written acknowledgments of title should be immediately obtained from all such occupiers. And in every case in which one person allows another to occupy any part of his estate without paying rent, or to receive any part of his rents without account, not only should he obtain a written acknowledgment of title to be signed by such person, but he should require a renewal of it every year, just as he would payment of rent, for oddly enough, the time begins to run against the owner the moment after the person in possession has acknowledged his title, so that even where an annual acknowledgment is taken,

(*l*) Sec. 8.(*m*) Sec. 35.(*n*) Sec. 14; Incorporated Society v. Richards, 1 Dr. & War. 258.

with the exception of a momentary interval, *time is always running against the owner*, although every renewed acknowledgment renders it necessary to begin a new computation. If an acknowledgment were postponed for five or ten years, it would probably escape recollection altogether.

11. In the case of an actual lease in writing at a rent not less than 20*s.*, a receipt of rent by a stranger is made equivalent to an actual possession by him, contrary to the former rule, that a receipt of rent was no ouster, as no man could by wrong have my right (*o*). Where a stranger has been in possession or in receipt of rent, the circumstance that some of the tenants fall into arrears, and that their rents are permitted to be unpaid for a number of years, cannot make any difference where the rent is actually received. The statute did not mean a compulsory half-yearly payment of rent; it looked only to a regularly-continued possession. The question under the statute is, by whom the rent was received, and in what character (*p*)? But this provision does not include other leases in writing, nor was it intended it should (*q*), and they therefore are still obnoxious to the old rule, and consequently in such cases the mere receipt of the rent by a third person will not of itself operate adversely to the real owner.

12. The clause which regards tenancies at will, provides that the time shall run either from the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined; which means, that if it do not sooner deter-

(*o*) Sec. 9; 3 Dru. & War.
403.

(*p*) 3 Dru. & War. 403.

(*q*) See 1 Rep. R. P. Comm. 47.

mine, it shall be taken to have determined at the end of one year (*r*). If a tenancy from year to year actually determine by the death of the tenant within the twenty years, a tenancy by sufferance will then continue the twenty years, and not be the commencement of a new term of twenty years within which to claim: unless a new tenancy be created in the person who enters upon the death of the tenant at will, time will continue to run against the claimant.

13. The *decision* in *James v. Salter* (*s*) withdraws from the operation of the 3d section cases of the creation of rents, for example, by will, and the principle of the decision would, as we have seen, if followed up, exclude from the operation of that section all particular estates not clothed with possession, whether created by deed or will. But to whatever extent the case may be followed, the question is, how far will the doctrine of adverse possession apply? Cases will be included in the 2d section, although excluded from the 3d, and all the general provisions in the act relating to possession by tenant at will, from year to year, by lessees for years by writing, and the like, will equally apply to them; but it may be argued that, where the new law is silent, a possession in such cases which would not have been adverse before the act, will not now have that operation. This of course would be a surprise upon the framers of the act (*I*), who no doubt con-

(*r*) See the provision in the 8th section. (*s*) *Supra*, p. 19, pl. 10.

(*I*) This passage, which was written immediately after the passing of the act, in the last edition of the *Purch.*, ended here and stood thus: "but it should seem that, where the new law is silent, a possession in such cases which would not have been adverse before the act, will not now have such operation. This of course would be a surprise upon the framers of the act."

sidered that they had provided in the 3d section for every case that could occur. In favour of the obvious intention of the legislature, it may be urged that the 2d section is general, and does not attempt to explain the nature of the right: this is, however, to be gathered from the other parts of the act, as far as express provision is made when the right shall be deemed to first accrue; and it may be fairly argued that although a given case may not fall within any of those provisions, yet the nature of the right, or, in other words, the quality of the possession in favour of which time is to run, must be deemed to be the same in all cases falling within the 2d section, although some may not be specially provided for by subsequent parts of the act. When the possession was not adverse at the time of passing the act, five years were allowed beyond the twenty years; this provision applies to cases within the 2d section, although unaffected by the 3d, and it seems to show that in this case only was the operation of non-adverse possession to be stayed, after the passing of the act. The provisions as to disabilities, and making forty years an absolute bar, apply to all cases within the 2d section, and it would be a narrow construction to hold that in some of those cases adverse possession only, in the sense of the old law, would make the time run under the new law. The Courts would no doubt struggle against such a construction (*t*).

14. It should be kept in view that forty years are not a bar against all the world. The twenty years form the regular bar, and the savings are the exception, and the forty years run only in the case of disabilities,

(*t*) See 1 Hayes' Conv. 253, 271.

in even which case not more than forty years are allowed. But the twenty years run only from the time when the right first accrued, and that in the case of a remainder, for example, is not until it falls into possession, which event, in the common case of an estate for life with a remainder over, may not happen within forty years of its creation. Of course after the time has begun to run, new rights, as we have seen, cannot be created by the person affected; so as to give further time to persons claiming under him (*u*).

15. The decision in *Doe v. Bramston* (*x*) may be held to govern a case which frequently occurred before fines and recoveries were abolished, and will, no doubt, still often arise. I allude to a conveyance by husband and wife of her fee-simple estate by a conveyance not operative to bind her: the operation of such a conveyance was, to pass the husband's interest in his marital right, or as tenant by the curtesy, as the case might be, and the wife or her heir was entitled to recover upon the determination of that estate, from which time, but not before, time ran against them. It may be considered difficult to distinguish that case from *Doe v. Bramston*, where the possession follows the conveyance, for that decision has established that a married woman is within the first case provided for by the 3d section, and therefore time will run against her if she and her husband discontinue the possession; and, although she is from her disability within the savings, yet that her right will not endure beyond forty years, notwithstanding that her husband himself lived beyond that period; her right was not considered

(*u*) *Stackpoole v. Stackpoole*, 4
Dru. & War. 320, *supra*.

(*x*) *Supra*, p. 79, pl. 4; 1 Coll.

to be saved by the continuance of his estate by the curtesy, and adverse possession, in the old sense, was not deemed requisite. Now in the case supposed, the wife would equally quit the possession, and her rights would be saved to the same extent, viz. for forty years; and it certainly is difficult, consistently with the above decision, to allow her any further time. But still, although now adverse possession is not necessary, there is a marked distinction between a conveyance and a mere vacant possession; for after the conveyance the husband could not enter against his own act, and the wife would have no right to do so in respect of her estate, so that she might be barred altogether if her husband lived beyond forty years without having had any power to recover. It may well be held, therefore, that where there is a conveyance the case is not governed by that of *Doe v. Bramston*.

16. This construction of the act is now established by the opinion of Shadwell, V. C., in *Jumpson v. Pitcher* (*y*); he thought that the distinction existed, and that the right of the wife came within the fourth description of interest in the 3d section, "or other future estate or interest:" he could not imagine that there was any resemblance between a case where there is merely an abandonment of possession, whereby no estate passes from the husband and wife; that is to say, no estate passes by any act of the husband, and a case like that before him, where the act of the husband has such an effect upon the whole inheritance, that upon the determination of the coverture the right remains in the wife if she survives, or in her heir if she predeceases her husband.

(*y*) 13 Sim. 327; and see *Ravald v. Russell*, You. 9, a case upon the 21 Ja. 1, c. 16.

SECTION V.

WHERE THE BAR OF TENANT IN TAIL EXTENDS TO THOSE
IN REMAINDER.

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| <p>1. <i>Bar of tenant in tail by time bars remainder-man.</i></p> <p>2. <i>Where tenant in tail dies before the time is out, remainder-man has the rest wherein to prosecute.</i></p> <p>4. <i>Possession under an imperfect assurance by tenant in tail: when to be made good.</i></p> <p>5. <i>Proposition of commissioners thereon.</i></p> | <p>6. <i>How carried out by the 23d section.</i></p> <p>8. <i>Does not operate retrospectively, semble.</i></p> <p>9 } <i>Base fees, how affected.</i></p> <p>10 }</p> <p>11 } <i>Voidable fees.</i></p> <p>12 }</p> <p>13. <i>Pleading of statute, where right extinguished generally.</i></p> |
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1. WHEN the right of *a tenant in tail* has been barred by reason of the entry, distress or action not having been made or brought within the period before limited, no such entry, distress or action can be made or brought *by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred (a).*

2. And when *a tenant in tail* has died before the expiration of the period before limited, *no person claiming any estate, interest or right which such tenant in tail might lawfully have barred* can make an entry or distress or bring an action but within the period during which, if such tenant in tail had so long continued to live, *he* might have made such entry or distress or brought such action (b).

3. These were reasonable provisions. The neglect of the tenant in tail will bar all those—issue in tail and remainder-men—whom the tenant in tail himself might have barred, and if the whole time has not run against him, the persons, issue or remainder-men, whom he could have barred, have only the time which remains to run within which to prosecute their right; and thus claiming, as it were, to stand in his place, they cannot claim the benefit of the savings in the act in regard to their own disabilities.

4. And when a tenant in tail has made *an assurance which does not operate to bar an estate, to take effect after or in defeasance of his estate tail*, and any person is *by virtue of such assurance*, at the time of the execution thereof, or at any time afterwards, in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail), continues or is *in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid*, then at the expiration of such period of twenty years *such assurance* will be effectual as against any person claiming any right to take effect after or in defeasance of such estate tail (c). It should be kept in view, that to give operation to

this clause some person must *by virtue of the assurance* be in possession or receipt of the profits ; but it is immaterial whether *such* possession or receipt be at the time of the execution of the assurance or at any time afterwards ; but this must be followed by twenty years' possession from the time fixed by the same person *or any other person* (not being a person entitled to such possession, &c., in respect of an estate which shall have taken effect after or in defeasance of the estate tail).

5. One of the propositions of the real property commissioners was, that on any alienation by tenant in tail by any assurance *not operating as a complete bar to the estate tail, and all estates, rights and interests limited to take effect on the determination or in derogation of the estate tail*, possession under such assurance should have the same effect in barring the estate tail, and all estates, rights and interests limited to take effect on the determination or in derogation of the estate tail, as if such possession had been adverse to the said estate tail, or to the said estates, rights and interests (*d*). In their preliminary observations their proposition was, that where there had been an adverse possession for twenty years, under a base fee, created by tenant in tail, the remainders over and the reversion should be barred in the same manner as if a recovery had been duly suffered (*e*).

6. These intentions were carried into effect by the enactment in the 23d section before quoted ; which requires a possession or receipt for twenty years next after the commencement of the time at which *such assurance*, if it had then been executed by the tenant in tail, or the person who would have been entitled to his estate

(*d*) 1 Rep. 79 ; Propos. 15.

(*e*) 1 Rep. 46.

tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, at the end of which twenty years *such assurance* is made effectual against any claimant after or in defeasance of such estate tail. The assurance referred to is the one made by the tenant in tail. The operation of the clause, therefore, is not strictly to make time a bar, but to make time give a full operation to the assurance executed by the tenant in tail.

7. The clause is framed with reference to the new plan of assurance by the substitution for recoveries act, to which it plainly refers, and there is no objection in point of law to an earlier statute operating on a later. The effect of the clause therefore is, that where tenant in tail executes a deed enrolled under the later act, which for want of the consent of the protector, operates only to create a base fee, under which possession is obtained, the title will become good against those in remainder at the end of twenty years from the period when the tenant in tail, or his issue, could without the consent of any third person have barred the remainders over under the substitution for recoveries act. But this operation will not be effected if the assurance already executed would not, if then executed without consent, have operated to bar the estates in remainder. It will be necessary, therefore, in all such cases, to ascertain that the assurance was duly made and enrolled.

8. This clause it is apprehended has not a retrospective operation: it could hardly be held to apply to a case where the twenty years had wholly elapsed before the passing of the act, because not only the

language of the section does not embrace such a case, but the substitution for recoveries act makes good defective fines and recoveries, where such was the intention, and gives confirmation in certain cases in express words to voidable estates *already created*, or thereafter to be created by tenant in tail (*f*).

9. And where a base fee has been created *before* the new statute of limitations, but the twenty years have not run, the case does not seem to fall within the section, because if the base fee were, as it is probable, created by a fine, that assurance would not, as an assurance, at any period have operated to bar the remainders (for non-claim upon a fine is not now in question); and if it were a recovery, still that could have no new operation, for *that assurance* could not, since the substitution for recoveries act, be made at all, and the terms of the section require that *such assurance, if then executed*, would have operated to bar such estates. Besides, the language of the section is not retrospective: "when a tenant in tail shall have made an assurance, &c., and any person shall, at the time of the execution, or at any time afterwards, be in possession, &c." And the clause speaks only of *consent* of another person, manifestly referring to a protector, and does not speak of a person whose *concurrence* was necessary in making a tenant to the *præcipe*. If it had been intended to extend the clause to such a case, it can hardly be supposed that such an inartificial mode of expressing that intention would have been adopted.

10. Base fees are frequently created, but it is seldom, if they do not quickly determine, that they are not

enlarged into pure fees. I do not remember more than one instance of a conveyance by way of transfer of a base fee actually in existence; and it rather seems, that those created before the act by tenant in tail in possession are by another section rendered unassailable. It may be assumed generally, that whenever such a tenant in tail created a base fee, he discontinued the remainder or reversion, and turned it to a right, and therefore the remainder-man or reversioner was driven to his formedon upon the determination of the estate tail. Now the act abolishes all such real actions, and contains, as we have seen, but two savings, one allowing real actions to be brought before the 1st June 1835, which has now ceased to operate, and the other, that when, *on the 1st June 1835*, any person whose right of entry shall have been taken away by any descent cast, *discontinuance*, or warranty *might maintain* any such suit or action (which includes formedon), such suit or action may be brought after 1st June 1835, but only within the time allowed by this act (*g*). If, therefore, a base fee had still continuance on the 1st June 1835, yet a remainder-man whose right of entry had been taken away by discontinuance might not maintain any such suit or action until the determination of the base fee, and consequently it seems that his remedy is taken away by the 36th section, which abolishes real actions, and is not saved by the subsequent sections. This, probably, was not the intention; but if the act was intended to save to such persons the same right as to time as was given to those whose right of entry had not been taken away, that might have been clearly expressed, although it had

been deemed proper still to leave such persons to their real action. A statute, however, which allowed only six months to present claimants to bring real actions, might consistently with that provision take away all power to bring such an action where no present right existed. Still this would leave the question open as to base fees, where there was no discontinuance.

11. A voidable fee, as where a tenant in tail has conveyed by lease and release to one in fee, stands upon a different footing. The substitution for recoveries act provides for its confirmation in certain cases (*h*), but if it be not confirmed, the right of the issue to avoid it would, it should seem, be governed by the 2d section, unaffected by the 3d section; whereas if the remainder-man or reversioner, whose right of entry was not taken away, seek to recover the estate, his right would be governed by the 2d section *and* that branch of the 3d section which relates to future estates; but in either case it is apprehended that the provisions relating to disabilities would apply to the claimant (*i*). For, although no doubt the 3d section was intended to describe all the cases which could fall within the 2d, yet as it has not that effect, and still the 2d section is in full operation, there is no reason why the savings in the act should not apply to cases within the 2d section, although they may not be governed by the 3d. The 2d section speaks of the right first accruing, although it does not define when the right first accrues, and it is left therefore to the law to mark the period, where the case does not fall within the 3d section; yet the 16th, 17th, and 18th sections, which refer to persons under disabilities,

(*h*) *Infra*, ch. 2.

(*i*) Sections 16—18.

when the time *shall have first accrued as aforesaid*, apply as forcibly to cases within the 2d section only, as to those within that section and also within the 3d section (*i*).

12. It should be observed, that where a base fee has been acquired under a conveyance by a tenant in tail which is avoidable by the issue in tail by entry, it has all the incidents of a rightful estate until defeated. If the issue in tail neglects to make an entry so long that his right of entry is gone, this continuance of possession by parties claiming under the base fee cannot alter the nature of the estate, but its effect is to bar the claim of the issue in tail, and so to render the base fee indefeasible, and to confirm the estates of those who claimed under conveyances of the base fee (*k*).

13. Where the statute has extinguished the right, the bar need not be specially pleaded, but may be given in evidence on the plea in bar, of non-tenant (*l*).

(*i*) Vide *supra*.

(*k*) See 15 Mees. & Wels. 793,
794, *per* Curiam.

(*l*) Owen *v.* De Beauvoir, 16

Mees. & Wels. 547; see further as
to pleading, Jones *v.* Jones, 16
Mees. & Wels. 699.

SECTION VI.

OF BARS IN EQUITY.

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| <ol style="list-style-type: none"> 1. <i>Same period as at law : section 24.</i> 2. <i>Right of legal mortgagee to file a bill.</i> 3. <i>Equitable discretion abolished.</i> 4. <i>Compensation for equitable waste within the act.</i> 5. <i>The claimant must be ascertained.</i> 6. <i>Bar of charities.</i> 7. <i>Filing a bill stops time running.</i> 8. <i>Appointment of a receiver ; its effect.</i> 9. <i>Express trusts saved : section 25.</i> 10. <i>Concealed frauds : section 26.</i> 11. <i>Trustee's possession does not run against cestui que trust.</i> 12. <i>Possession against trustee and cestui que trust operates as a bar.</i> 13. <i>What is tantamount to an express trust.</i> 14. <i>Where a legacy has become a trust fund.</i> 15. <i>Money secured on land or rent by an express trust within section 25.</i> 16. <i>As a trust for payment of debts or portions.</i> 17. <i>A trust for debts includes a judgment debt.</i> | <ol style="list-style-type: none"> 18. { <i>Legacies on land secured on land or rent by an express trust within section 25.</i> 19. { 20. <i>A mere charge not an express trust.</i> 21. <i>Remainder-man's right under section 25.</i> 22. <i>What amounts to a concealed fraud.</i> 23. <i>Possession under a common mistake.</i> 24. <i>Acquiescence still operative.</i> 25. <i>Mortgagee in possession without acknowledgment of mortgagor's title, time runs : section 28.</i> 26. <i>Effect of purchase by mortgagee of the estate for life in the equity of redemption.</i> 27. { <i>Transfer of mortgage, as such, by mortgagee alone not an acknowledgment.</i> 28. { 29. <i>Keeping accounts not an acknowledgment, semble.</i> 30. <i>Where a letter is an acknowledgment : who is an agent to receive it.</i> 31. <i>No savings for mortgagor under section 28.</i> 32. <i>Whether a bill filed will at law save time.</i> |
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1. AFTER the 31st of December 1833 no person claiming any land or rent in equity is to bring any suit to recover the same but within the period during which

he might under the act have made an entry or distress, or brought an action to recover the same, if he had been entitled at law to such estate, interest, or right in or to the same, as he shall claim therein in equity (a).

2. This 24th section, it has been said, is not well framed as regards mortgages, for in words it applies only to an equitable mortgagee, and gives him the same right in equity as he would have had at law if he were a legal mortgagee ; but it is impossible to suppose, that where a mortgagee was formerly entitled to relief in equity, he was not still to have the right within the time appointed, although he had the legal estate. An equitable mortgagee could clearly file a bill for a foreclosure and for the legal estate under the 24th section ; and as the intention seemed clear, it was not difficult, by a slight modification, to give the enlarged construction to the 24th section. The statute 1 Vict. c. 28, appeared to be a legislative adoption of that construction, as it provides, that any person entitled to or claiming under *any mortgage* of land may bring an action or *suit in equity* to recover such land within the time thereby limited, although more than twenty years have elapsed since the time at which the right to bring such action or *suit in equity* shall have first accrued. This must mean the right under the 3 & 4 Will. 4, and consequently the legal and equitable rights under that statute are treated as being co-extensive (b). It has consequently been held that the right to file a bill of foreclosure, whether the plaintiff's mortgage be a legal or an equitable one, falls within this 24th section ; and that the time is governed by the legal right of the party to bring an action ; or if he have not the legal

(a) Sect. 24,

(b) *Per Curiam*, 3 Dru. & War. 118, 119.

estate, by the right which he would have had if his estate had been a legal instead of an equitable one. And it was said, that if the 24th section does not extend to a legal mortgage, then it is a *casus omissus* out of the act; and as the general right of a mortgagee to file a bill of foreclosure is not taken away, equity would once more adopt the legal rule by analogy (*c*).

3. Upon the provisions in the section under consideration it has been observed, that the statute intended to put an end altogether to the discretion of courts of equity in those cases in which they had before acted by analogy to the time limited at law. That was an analogy founded both in law and good sense, but it no longer remains in the discretion of the Court, but is incorporated in the statute (*d*).

4. A claim to compensation in equity for equitable waste falls within the provisions as to the land itself, and a suit for such compensation is subject to the like limitations: of course therefore a tenant in tail in remainder has twenty years wherein to file his bill, however long may have been the period of the life of the tenant for life subsequently to the waste (*e*); and the circumstance that there is a fund in Court, the rights in which have not been ascertained, may assist the claim of an equitable incumbrancer (*f*).

5. Where a company took common land under the provision of an act of Parliament, to which a title could not then be made, but did not pay the money as they ought to have done into the Court of Chancery, and

(*c*) *Wrixon v. Vize*, 3 Dru. & War. 104; see sect. 40, *infra*.

(*e*) *Duke of Leeds v. Lord Amherst*, 2 Phill. 117.

(*d*) *Berrington v. Evans*, 1 You. & Coll. 434.

(*f*) *Lancaster v. Evors*, 10 Beav. 154; see *Vickers v. Oliver*, 1 You. & Coll. N. S. 211; 1 Jo. & Lat. 534.

more than thirty years elapsed before it was ascertained to what class of persons the land belonged, it was held that their right was not barred by non-claim. It was considered to be very questionable whether, as the money had not been paid, but remained in the hands of the company, any length of time would be a bar to the lawful claimant in equity, where the case starts from the proposition that the one is *cestui que trust* and the other trustee. There could be no laches until the person was ascertained. If, indeed, after the determination of the rights of the parties, a period of twenty years had been suffered to elapse, the case would have been very different. If the money had been paid into the Court of Chancery, the Court would have become the trustee of the money for the parties ultimately entitled, and no one would have doubted as to their rights (*g*).

6. Although an estate is held for a charity, it may be barred by adverse possession (*h*). As to the equitable right, section 24 is quite as imperative as the enactment binding legal estates: no person can bring any suit but within the legal limitation. This leaves to equity no discretion. The statute deals generally with equitable rights, and treats them thus far on the footing of legal interests. Then comes the exception in section 25, which we shall presently notice. Now unless a case can be brought within this saving, which operates between trustee and *cestui que trust*, it would fall within the general prohibition in section 24. For charities were only saved in equity from the operation of the former statutes as trusts, although highly favoured

(*g*) *Cater v. Croydon Canal Company*, 4 You. & Coll. 405.

(*h*) *Supra*, sect. 3, pl. 26.

ones, and now all trusts are barred by section 24, unless saved by section 25, and a Judge is not at liberty to introduce an exception into the act which the legislature, providing generally for all trusts, has not thought it proper to enact (*i*). But there must be a person to claim in order that time may run (*k*), and a charge in favour of a charity may have an operation in favour of it, which would be denied to any other claim (*l*).

7. It has been held that filing a bill, though no subpoena be served, is sufficient to prevent the operation of the statute (*m*).

8. The appointment of a receiver by the Court does not prevent the bar under the statute *against* a stranger, but such an appointment prevents, at least in equity, time from running *in favour* of a stranger to the suit (*n*).

9. The section which we have just considered provides a limited remedy for the recovery of equitable interests. There are many such interests where there is no declared trustee of the legal estate nor any trust expressed, yet the legal interest is bound by the equitable right :—in many cases by an implied trust, in some by the mere operation of acts of ownership by the person who may happen to have only an equitable estate. A mere wrongdoer, continuing to hold an estate to which he was entitled, cannot be considered as a trustee for anybody (*o*). The act proceeds to provide

(*i*) *Per Curiam*, 2 Jo. & Lat. 195.

(*k*) *Attorney-General v. Persse*, 2 Dru. & War. 67.

(*l*) 2 Jo. & Lat. 197, 198.

(*m*) *Boyd v. Higginson*, 1 Flan. & Kel. 603; *Harrison v. Duignan*, 2 Dru. & War. 295; *Forster v. Thompson*, 4 Dru. & War. 303;

Purcell v. Blennerhassett, 3 Jo. & Lat. 24; see *Carroll v. Darcy*, 10 Ir. Eq. Rep. 321; *Bennett v. Bernard*, *id.* 584; *Morris v. Ellis*, 7 Jur. 413.

(*n*) *Wrixon v. Vize*, 3 Dru. & War. 123.

(*o*) *Ex parte Hasell*, 3 You. & Coll. 617.

for express trusts by the 25th section. It enacts that when any land or rent is vested in a trustee upon any *express trust*, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, will be deemed to have first accrued at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him (*p*).

10. But in every case of a *concealed fraud* the right of any person to bring a suit in equity for the recovery of any land or rent which he, or any person through whom he claims, may have been deprived by such fraud, will be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered; but no owner of lands or rents can, under this provision, have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any *bonâ fide* purchaser for valuable consideration who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed (*q*).

11. This section, which provides for express trusts, renders lapse of time unimportant in all cases within the section, that is between the *cestui que trust* and

(*p*) Sect. 25; see *Burne v. Robinson*, 1 Dru. & Wal. 688; *Thompson v. Simpson*, 1 Dru. & War. 459; *Law v. Bagwell*, 4 Dru. & War. 398.
 (*q*) Sect. 26.

his trustee until the trust is disturbed, and that disturbance can only be effected by such a denial of the trust as takes place when the trustee sells to a third party for valuable consideration the property so held by him in trust (*r*). Therefore a trustee remaining in possession never acquires possession adverse, within the meaning of the act, to the title of his *cestui que trust*, and if he convey to any one not for value, the same result follows (*s*).

12. But a case does not fall within section 25 where a man has received the rents for his own benefit as against the trustee as well as against the *cestui que trust* (*t*). The section is confined to suits against the trustee or any person claiming through him. A man may be a *cestui que trust*, and yet not be able to enforce his rights through the trustees against third persons (*u*). A purchaser in possession not having paid the purchase money, is not an express trustee for the vendor within this section (*x*).

13. Although the section under consideration speaks of an express trust, yet a trust may fall within its enactment where the trust is not in words expressly declared. Therefore where a man is made an express trustee of a term for certain purposes, and is on the face of the instrument, by the rule of equity, a trustee of the surplus, he is a trustee throughout within this section (*y*). What amounts to a sufficient expression

(*r*) 4 Dru. & War. 403.

(*s*) 1 Jo. & Lat. 304.

(*t*) *Burroughs v. McCreight*, 1 Jo. & Lat. 290; *Commissioners of Char. Don. v. Wybrants*, 2 Jo. & Lat. 191.

(*u*) 4 Dru. & War. 409.

(*x*) *Toft v. Stephenson*, 7 Hare, 1; sect. 40, *post*.

(*y*) *Salter v. Cavanagh*, 1 Dru. & Wal. 663; see *Attorney-General v. Flint*, 4 Hare, 147; and see 2 Jo. & Lat. 196, 197.

of a trust must depend upon the terms of the instrument and the rules of equity (*z*). It certainly is not necessary to use the word "trust" in order to create an express trust (*a*).

14. Where a fund has ceased to bear the character of a legacy and has assumed the character of a trust fund, although it is still vested in the executor or his representative, time will not run against the legatee under the 40th section (*b*).

15. This section is plain enough where the *cestui que trust* seeks to recover land or rent (as explained by section 1) from his trustee (*c*); but where he seeks to recover money secured in any manner upon land or rent, his right to do which is limited by section 40, or arrears of rent, or interest of money so charged, his right to recover which is limited by section 42 (both of which sections we shall presently consider separately), great difficulty has arisen in attempting to discover the true meaning of the act. For section 25 in words extends only to suits for the recovery of the land or rent itself, and neither of the sections 40 and 42 contains any reference to that previous section, or any provision for relief against a trustee. Yet it is plain that the framers of the act did not intend to keep open a remedy against a trustee of land or rent where the *cestui que trust* is entitled to the very subject, and to close the door against a *cestui que trust* of the produce of the subject however extensive his right. It is

(*z*) Commissioners of Char. Don.
v. Wybrants, 2 Jo. & Lat. 182;
Hunt v. Bateman, 10 Ir. Eq. Rep.
360.

(*a*) See 2 Jo. & Lat. 197.

(*b*) Phillipps v. Munnings, 2

Myl. & Cra. 309; Roch v. Callen,
6 Hare, 535.

(*c*) Commissioners of Char. Don.
v. Wybrants, 2 Jo. & Lat. 182;
see 10 Ir. Eq. Rep. 373.

possible by a liberal interpretation to bring the cases which fall directly within section 40 also within the operation of section 25, but if that cannot be accomplished, the statute clearly does not take away the right of the *cestui que trust* by any express words; and therefore by analogy to the provision in section 25, the same remedy would lie in equity by a *cestui que trust* against a trustee for any sum of money charged upon land or rent as he would have had if his right extended to the land or rent itself. The act, however, has very much embarrassed the judicial authorities (*d*), but the construction is now settled.

16. Therefore a trust by deed or will for the payment of debts or portions, or the like, out of land or rent, may be enforced against a trustee under the exception in section 25 (*e*), or under the exception grafted upon it (*f*). In the case of portions secured by a term of years, for example, where they have not been raised within the time of limitation under the 40th section, yet if the term which secures them is not barred, the trustees are not prevented from raising the portions, and when raised they will hold the money as trustees for the children. In such a case between trustee and *cestui que trust* the statute has no application. The trustees did not hold adversely to the *cestuis que trust*, but for their benefit (*g*).

(*d*) See 3 Ir. Eq. Rep. 81; 1 Dru. & Wal. 698; 10 Ir. Eq. Rep. 366, 380; Young *v.* Wilton, *id.* 19; 11 Ir. Eq. Rep. 158.

(*e*) Dillon *v.* Cruise, 3 Ir. Eq. Rep. 70; Young *v.* Lord Winterpark, 13 Sim. 199; 10 Jur. 1; see 10 Ir. Eq. Rep. 368; Blair *v.* Nugent, 3 Jo. & Lat. 658; 9 Ir. Eq. Rep. 400; 10 Ir. Eq. Rep. 369;

Ward *v.* Arch, 12 Sim. 472; Heenan *v.* Berry, 2 Jo. & Lat. 303; Gough *v.* Bult, 16 Sim. 323; Hart *v.* Bateman, 10 Ir. Eq. Rep. 360; Dundas *v.* Blake, 11 Ir. Eq. Rep. 138.

(*f*) See 10 Ir. Eq. Rep. 380, 381.

(*g*) Young *v.* Lord Waterpark, 13 Sim. 199; 10 Jur. 1.

17. A trust by will for the payment of debts includes a judgment debt, which may be recovered under the express trust without being affected by the later sections (*h*).

18. In regard to legacies, the words in the 40th section are, after providing for charges upon land, "or any legacy;" and it has been decided that the statute extends to legacies of personalty (*i*); but it has been determined that legacies out of land, although secured by express trusts, fall within the 40th section, and are not within the exception in the 25th. The learned Judge who decided this point relied upon the distinctions to which we have already adverted between the two sections, and he said that it would, he knew, be difficult if not impossible to establish any substantial distinction between them in reference to the operation of the statute. He said it was plain that, except through means of a trust, no legacy can be charged on real estate; and he thought that if he held a legacy charged on land to be within both the 40th and the 25th sections, one of the sections must be inoperative (*k*).

19. It would seem that there is no sufficient ground to distinguish legacies from other charges, now that it is settled that the latter, although provided against by the 40th section, fall within the 25th section, where there is an express trust to raise them. And even

(*h*) *Dillon v. Cruise*, 3 Ir. Eq. Rep. 70.

(*i*) *Sheppard v. Duke*, 9 Sim. 567; *O'Hara v. Creagh*, Long. & Town. 65; *Henry v. Smith*, 2 Dru. & War. 381; the reporter's note, 2 Myl. & Cra. 315. In *Campbell v. Sandford*, 8 Bligh. N. S. 622.

Lord Brougham observed that the late act had settled periods of limitation in other cases, but there was none fixed with respect to a legacy.

(*k*) *Knox v. Kelly*, 6 Ir. Eq. Rep. 279; see 10 Ir. Eq. Rep. 366, 367; 11 Ir. Eq. Rep. 159.

under that construction neither section would, as to legacies, be wholly inoperative, for legacies may be charges on land within the 40th section, and yet not be secured by an express trust within the 25th section. And accordingly in a later case (*l*), in which, however, the former case was not referred to, it was decided that a legacy out of land, under an express trust, was within the protection of the statute, unaffected by the later provisions.

20. A mere charge upon land for one person, or for a class, with a devise of the land, subject to the charge to another, does not create a trust in the devisee of the land so as to prevent time from running against it as a mere charge; nor does a conveyance to a purchaser, subject to an incumbrance, operate further than to make him liable to it as a charge (*m*). So a devise to one *paying* a sum to another creates a charge and not a trust, and therefore is not saved by the 25th section (*n*). In these and the like cases there is an obligation imposed, but no trust created.

21. A party having an interest in remainder is entitled to the benefit of the 25th section from the time when his right to possession accrues (*o*).

22. Where a person with a present limited right (*p*) claimed the fee under deeds and a will executed by the reversioner, which after the latter's death were held to be fraudulent, and to have been obtained whilst

(*l*) *Gough v. Bult*, 16 Sim. 323; see *Ward v. Arch*, 12 Sim. 472.

(*m*) *Harrison v. Duignan*, 2 Dru. & War. 295; *Hughes v. Kelly*, 3 Dru. & War. 482; *Francis v. Grover*, 5 Hare, 39; *Hunt v. Bateman*, 10 Ir. Eq. Rep. 363; *Dundas v. Blake*, 11 Ir. Eq. Rep. 138: as

to charities, see 2 Jo. & Lat. 197, 198.

(*n*) *Hodge v. Churchyard*, 16 Sim. 71.

(*o*) *Thompson v. Simpson*, 1 Dru. & War. 489.

(*p*) *Blair v. Nugent*, 3 Jo. & Lat. 658.

the party was of unsound mind; upon a bill filed by the heir of the latter, it was held that the possession was under and not in opposition to the title of the grantor and devisor, and it was treated as a case of concealed fraud within the meaning of the statute (*q*).

23. In a case (*r*) where a party entitled to two-fourths of an estate, the right to one of which depended on the life of a third person, continued to receive the profits of both, whilst the co-tenant of another fourth, who was entitled also to the one-fourth which had gone over on the death of the *cestui que vie*, continued to receive the profits of his original one-fourth only; it was held that this was a common mistake of the operation of the deed, but that the claimant had the means, with proper diligence, of removing the misapprehension of fact under which he laboured; and a court of equity, unless the mistake be clear, and the party be without blame or neglect in not having discovered it earlier, ought, in the exercise of a sound discretion, to adopt the rule given by the statute as its guide (*s*).

24. The act does not interfere with any rule or jurisdiction of courts of equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by the act (*t*). Therefore where a seller of a reversion filed his bill sixteen years after it fell into possession, to set aside the sale, without accounting for the delay, and

(*q*) *Davis v. Thomas*, 3 Hare, 26.

(*r*) *Denys v. Shuckburgh*, 4 You. & Coll. 42.

(*s*) See the terms of s. 26; *qu.*

whether they were sufficiently attended to in the above case.

(*t*) Sect. 27; *ex parte Hasell*, 3 You. & Coll. 617; *Thompson v. Simpson*, 1 Dru. & War. 489.

requiring the purchaser to prove that he gave a fair price for the estate, the bill was dismissed with costs. It was insisted that, by analogy to the statute of limitations, the seller would have twenty years after the death of the tenant for life within which he might file a bill. But the Court held that it did not follow that although a court of equity might consider itself bound for certain purposes by the statutes of limitation, it was bound to give relief in every case where, under analogous circumstances, the statute of limitations would not have applied at law. It was the duty of the Court to act upon the presumption which a court of justice most properly entertains against stale demands, and which could never be more applied than to a case where the burden of proof upon a most material point of controversy was thrown upon the defendant (*u*).

25. The existing rule as to mortgagees in possession is adopted. When a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing, signed by the mortgagee, or the person

(*u*) *Sibbering v. Lord Balcarras*, 19 Law J., N. S., 252; see *Thompson v. Simpson*, 1 Dru. & War. 489.

claiming through him ; and in such case no suit is to be brought but within twenty years after the time of such acknowledgment, or the last of such acknowledgments was given ; and where there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors, or his or their agent, will be as effectual as if given to all ; but where there is more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, will be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests ; and will not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent. And where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors will be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the

value of the whole of the land or rent comprised in the mortgage (*x*).

26. If a mortgagee under a tenant for life and a remainder-man enter into possession, and time begins to run, yet if before it has run out he purchase the life estate, although there is no change of possession the remainder-man will not, it seems, be barred during the life of the tenant for life. The possession, the Court observed, was not adverse. The 28th section supposes the existence of a person to whom the acknowledgment is to be made, as well as that of the party to make it: there must be not only a party to redeem, but one to be redeemed. The parties were not in the situation which the statute contemplates as creating a bar. The mortgagee became in effect the tenant for life of the equity of redemption, the remainder-man or reversioner may therefore properly look upon him as holding in that character: he would not necessarily refer his possession to any other title. It would be a surprise upon the parties interested in the property after the expiration of the life interest if they were told that the tenant for life had another and an adverse title, by means of which they are to be barred, and the tenant for life [of the life estate] to acquire an absolute interest (*y*).

27. In a case (*z*) in which a mortgage was transferred, as such, without the concurrence of the mortgagor, but which before the statute would have amounted to an acknowledgment of the subsisting equity of redemption, it was decided that the statute destroyed the

(*x*) Sect. 28; *Browne v. Bishop of Cork*, 1 Dru. & Wal. 700; *Wrixon v. Vize*, 3 Dru. & War. 104; *Batchelor v. Middleton*, 6 Hare, 75.

(*y*) *Hyde v. Dallaway*, 2 Hare, 528; *Wynne v. Styan*, 2 Phill. 303; *supra*, section 3, pl. 20.

(*z*) *Batchelor v. Middleton*, 6 Hare, 75.

operation of *such* an acknowledgment, because the statute requires that the admission should be made to the mortgagor himself, and by that the Court was bound, although it did not know why the mortgagee should not be allowed to make an admission in writing, signed by himself, of his mortgage title to a third person of which the mortgagor may have the benefit.

28. And where a mortgagee for years in possession executed a transfer of the mortgage term to a person who it was recited had purchased the securities and hereditaments, subject to such right and equity of redemption as the same premises were subject to, and also assigned to the purchaser the principal and interest due, and the recitals in the deed showed that the equity of redemption had not been barred, it was held by Shadwell, V. C., that the acknowledgment contained in the deed of the mortgagor's title was not a sufficient acknowledgment to make the mortgaged estate redeemable after twenty years from the first entry (*a*). In the course of the argument the Vice-Chancellor observed that the words of the Act are, "to the mortgagor, or some person claiming his estate." Was not, he asked, the purchaser claiming his estate? to which it was replied that the purchaser was claiming the estate of the mortgagee. These decisions appear to be fully warranted by the statute, for the acknowledgment was not within the terms of the statute, and of course before the twenty years have run out the mortgagee can only transfer his mortgage, subject to the subsisting equity of redemption; but still the assignee takes with the benefit of the time elapsed. The frame of the deed showed that the

(*a*) *Lucas v. Dennison*, 13 Sim. 584.

assignee purchased the mortgage, and the term itself, as far as the mortgagee had power to transfer them.

29. A point has been raised, but not decided, whether the right to redeem is not kept open where the mortgagee in possession has kept accounts of the rents received by him, and otherwise treated and considered himself as mortgagee (*b*); but this could hardly be held to supply the want of an acknowledgment; for during the twenty years, prudence would require that an account should be kept, and after that period, when the right to redeem is barred, no one has a right to inquire how the owner, though formerly a mortgagee, has kept his accounts. The statute intended to put an end to such inquiries.

30. A letter set up as an acknowledgment of the mortgagor's title should be construed in the way in which the writer intended it to be construed by the person to whom it was addressed (*c*). Where a letter which was held to amount to such an acknowledgment was written *by* a mortgagee,—who and whose father had been long in possession, and who was the owner of a moiety of the equity of redemption—to the grandfather of the *infant* heir, who, if the mortgage was still redeemable, was entitled to the other moiety of the equity of redemption, subject to the grandfather's right as tenant by the curtesy, but this letter was one in reply to one from the grandfather, which did not appear, and the acknowledgment was confined to the infant's title; it was held, that the question as to whether the grandfather was the infant's agent was, whether the party who wrote the

(*b*) *Baker v. Wetton*, 14 Sim. 426.

(*c*) 12 Sim. 406.

letter did not treat the party to whom it was written as the agent of the child. It was not necessary to make a person an agent that he should have an actual authority to act. It was quite sufficient that the grandfather acted as the agent of his grandchild, and that she, when she came of age, adopted what he had done on her behalf (*d*).

31. There is, it should be observed, no savings for disabilities of the mortgagor or his heirs in regard to the bar created by section 28.

32. Finally, it may under this head be observed, that as a suit in equity properly instituted will of course prevent time from running, it has been said that a court of law, now that the same rule is prescribed by the statute for both courts, should act upon that principle; at all events equity would protect its own jurisdiction, and would not permit the suitor to be evicted at law, who had an equitable right to sue for the land, and had filed his bill within the limit allowed, and duly pursued his remedy (*e*).

(*d*) *Trulock v. Robey*, 12 Sim. 402: "The letter, too, treats the grandfather as agent," p. 407, but that was only by construction.

(*e*) 3 Dru. & War. 123, *per* Curiam; see Flan. & Kel, 565, 566.

SECTION VII.

OF MONEY CHARGED ON LAND, LEGACIES, DOWER, RENT, AND INTEREST.

1. *Twenty years a bar of money secured upon land, &c., or a legacy: sect. 40.*
2. *Rent or interest barred by s. 42.*
3. *Foreclosure suit not within s. 40, semble.*
4. *Exceptions.*
5. *Meaning of a present right to receive.*
6. *Judgment creditor has a new right on a revivor on scire facias: not on action of debt or judgment.*
7. *Whether a judgment creditor's right is saved by a creditor's bill filed by another, to which he is not a party: Berrington v. Evans.*
8. *Watson v. Birch.*
9. *Observations on Berrington v. Evans.*
10. *Opinions thereon.*
11. *The rule suggested.*
12. *Judgments affecting personal estate only within the statute.*
13. *Collateral security saved by the continuance of the original security: Bennett v. Cooper.*
14. *Charge paid off by tenant for life not barred in his lifetime.*
15. *Must be a hand to pay and a party to receive.*
16. *Judgment on post obit; time does not run until death of person.*
17. *Vendor's lien barred by time.*
18. *Legacy out of personal estate barred by time: residue a legacy: subsequent assets: prior charges.*
19. *Remainder-man's right to legacy not barred during life of tenant for life.*
20. *Part payment prevents the bar: effect on collateral securities.*
21. *Acknowledgment saves the right.*
22. *Acknowledgment by trustee sufficient: Lord St. John v. Boughton.*
23. *Where letters amount to an acknowledgment.*
24. *Letter written by an amanuensis binding: initials of writer.*
25. { *Schedules, affidavits, answers,*
26. { *may amount to an acknowledgment.*
27. *Report of Master not an acknowledgment: Hill v. Stowell: doubted.*
28. *Express trust takes cases out of the 40th section.*
29. *Arrears of dower recoverable for six years only: s. 41.*
30. *Arrears of rent, or of interest of charge or legacy for six years only: effect of possession by prior incumbrancer: s. 42.*
31. *Sect. 42 applies to arrears of annuity.*

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| <p>32. <i>And to interest of money charged on land: not to turnpike tolls.</i></p> <p>33. <i>Nor to an annuity by will payable out of personalty; sed quare.</i></p> <p>34. <i>Interest on judgments within 42d section; right barred against real estate, barred also against personalty.</i></p> <p>35. <i>Section 42 operates on s. 26 of 3 & 4 Vict. c. 105.</i></p> <p>36. <i>Express trusts not within s. 42.</i></p> <p>37. <i>No savings in s. 42 for disabilities.</i></p> <p>38. { <i>Judgment creditor of remainder-man entitled to six years' arrears only.</i></p> <p>45. {</p> <p>39. <i>Acknowledgment of debt.</i></p> <p>40. <i>Difficulty created by 3 & 4 W. 4, c. 42.</i></p> | <p>41. <i>Whether rents reserved by lease fall within 42d section of c. 27.</i></p> <p>42. } <i>Opinions thereon.</i></p> <p>43. }</p> <p>44. <i>Rentcharge within both acts.</i></p> <p>45. <i>Possession by former incumbrancer saves the right.</i></p> <p>46. <i>Possession of judgment creditor operative.</i></p> <p>47. <i>Difficulty where principal and interest claimed.</i></p> <p>48. <i>Mortgage without covenant, wholly within 42d section of c. 27.</i></p> <p>49. <i>So if there is a covenant in the mortgage.</i></p> <p>50. <i>Arrears of fee-farm rent: no saving.</i></p> <p>52. <i>Of claiming the benefit of the statute: pleading.</i></p> |
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1. No action or suit, or other proceeding, can be brought to recover any money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same has accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, has been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case, the twenty years are to run from such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one (a).

(a) Sec. 40.

2. The 42d section, to which our attention will presently be drawn, limits the period within which arrears of *rent or interest* on any sum charged upon land or rent, or in respect of any legacy, can be recovered; but although that section requires a separate consideration, yet it is so much mixed up with the 40th section, which relates to the principal, as to render it necessary to bear it in mind whilst we are discussing the authorities on the former section.

3. This provision relates not to the land but to actions brought to recover the money; and those actions, in the case of mortgages, are either upon the covenant usually inserted in the mortgage deed or on the bond which commonly accompanies it (*b*); but still it has been held that this part of the statute may be pleaded to a bill of foreclosure, which, it is said, in effect is a proceeding for the recovery of the money secured by the mortgage (*c*). This, however, has not been followed, for the statute provides a remedy for the recovery of the estate, and also a remedy for the recovery of the money; clearly so when both are pursued, and equally so when both the remedies are enforced, or only one of them is enforced in equity. A foreclosure suit may lead to the payment of the money, but this is optional with the defendant; it cannot be enforced against him. The plaintiff's right is simply to foreclose, but he can only accomplish this upon a previous condition. The right of the defendant to pay the money, whilst the only right of the plaintiff is to the estate discharged of the equity, can hardly bring the case within the 40th section, which applies strictly

(*b*) See 5 Adol. & Ell. 296.

570; approved of in *Du Vigier v.*

(*c*) *Dearman v. Wyche*, 9 Sim. Lee, 2 Hare, 326.

to an action or suit to recover the money secured by any mortgage. This right at law cannot be confounded with the right to recover the estate; why should it in equity (*d*) ?

4. But the provision relates not merely to actions but also to suits or other proceedings. And it extends to money secured by mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent. The statute requires that there should be a present right to receive the money in some person capable of giving a discharge for or release of the same. And the statute says that such a claim shall not be made after twenty years, unless in the meantime some part of the money, either principal or interest, shall have been paid, or some acknowledgment in writing shall have been given. These are the only exceptions mentioned in the act, and a Judge cannot engraft another exception on the act of Parliament (*e*).

5. The phraseology of the act, "a present right to receive," &c. is new, and has been considered not very precise or clear, and its true construction has much embarrassed the courts (*f*). This section does not say *first* accrued. The word "present" has been said to mean the same as if the words "then present" had been used in the section (*g*). The opinion of the Judges in *Farran v. Beresford*, in the House of Lords, was, that by the words "a present right to receive the same,"

(*d*) *Wrixon v. Vize*, 3 Dru. & War. 104; see *id.* p. 120, *per* Curiam.

(*e*) 1 You. & Coll. 440, *per* Curiam.

(*f*) See *Ryan v. Cambie*, 2 Ir.

Eq. Rep. 328; *Farran v. Ottiwell*, 2 Jeb. & Sy. 97; *Watters v. Lidwill*, 9 Ir. Law Rep. 362, 586.

(*g*) *Palmer v. Alego*, 1 Jeb. & Sy. 501.

was meant an immediate right, without waiting for the happening of any future event (*h*).

6. It has been decided that a new right is acquired by the judgment of revivor on a *scire facias* issued on a judgment within twenty years (*i*); but it is otherwise when the judgment is in an action of debt upon a judgment, for in that case the last judgment operates from its date, and time runs under the 40th section against it from that period (*k*).

7. Before the late statute a bill filed by one creditor on behalf of himself and the others was held to prevent the old statute of limitations from operating as a bar against any other creditors who came in under the decree (*l*), and that has been followed in Ireland since the passing of the late act, where the bill was filed *before the act passed*, although it was not on behalf of the other creditors (*m*). But a judgment creditor of more than twenty years' standing who has neglected to take any step, cannot claim the benefit of a suit instituted within the twenty years by another creditor on behalf of himself and all the other creditors in which a decree was obtained within the twenty years, for nothing is said in the exceptions in the act of the case of a bill being filed by one creditor for the benefit of the rest. This was decided in *Berrington v. Evans* (*n*).

(*h*) 10 Cla. & Fin. 334; see 2 You. & Coll. 206.

(*i*) *Farran v. Beresford*, 10 Cla. & Fin. 319; *Farrell v. Gleeson*, 11 Cla. & Fin. 702.

(*k*) *Watters v. Lidwill*, 9 Ir.

Law Rep. 362; *Kealy v. Bodkin*, *ib.* 383.

(*l*) *Sterndale v. Hankinson*, 1 Sim. 393.

(*m*) *O'Kelly v. Bodkin*, 2 Ir. Eq. Rep. 361.

(*n*) 1 You. & Coll. 434.

8. And in a later case (*o*), which it might be found difficult to support, a bill filed by a creditor on his own behalf had the usual prayer for taking the accounts of the deceased debtor, and the application thereof in a due course of administration, and a judgment creditor was made a defendant, the bill praying the production of documents in his possession, and that the lien, *if any*, to which he was entitled might be ascertained and the amount paid to him in the priority in which he might be found to stand, and the decree, which was informal, directed generally, after payment of the plaintiff's demand, the other incumbrancers upon the estate to be paid according to their priorities; yet because the decree did not contain any direction to treat the judgment creditor as a creditor, although under further proceedings the Master had found what was due on the judgment, Shadwell, V.C., held that there was no acknowledgment of the creditor's right, and that it seemed to him that the language of the statute was imperative, and that it bound that case: he therefore decided that the judgment creditor was not entitled to be paid his demand on account of the lapse of time.

9. But *Berrington v. Evans* has been treated as depending upon particular circumstances, and it was said that instead of shaking the authority of *Sterndale v. Hankinson*, it rather corroborated it (*p*). Yet in two cases in Ireland before different courts, which cases it

(*o*) *Watson v. Birch*, 15 Sim. 523. In an earlier case, in which *Sterndale v. Hankinson* was cited, the Vice-Chancellor said that case was decided before 3 & 4 Will. 4, c. 27, was passed. That act applies

to every debt attempted to be proved after 31st December 1833; 9 Sim. 223, 224. see *infra*, pl. 27.

(*p*) *O'Kelly v. Bodkin*, 2 Ir. Eq. Rep. 369.

was considered could not be distinguished from *Berrington v. Evans*, that case was followed (*q*): in both the creditor excused his delay on the ground of his ignorance of the institution of the suit, and which defence it was held showed that the suit was not his. In another case in Ireland (*r*) it was decided that a judgment creditor could not, when time had run against him, claim the benefit of a pending suit by a mortgagee for a foreclosure and sale, for he, the creditor, could not have instituted such a suit (*s*).

10. In a case in Ireland (*t*) it was observed by the Chancellor, that as to the authorities he thought that the principles upon which the Court acts were correctly laid down in *Sterndale v. Hankinson*, which was decided before the new statute of limitations. *Berrington v. Evans* was, he apprehended, properly decided, but it did not impeach the previous decision, nor did it, he thought, prevent a creditor from coming in under another creditor's bill, filed for the general benefit of creditors, *where his demand would not have been barred had he himself filed the bill*, and he comes in according to the decree and the course of the court. Courts of equity should be cautious not to render it necessary for every creditor to file a bill upon his debtor's death in order to raise his demand where one suit (*u*) is regularly instituted. In a later case (*x*) in Ireland, the present Chancellor observed, that if *Sterndale v. Hankinson* was

(*q*) *O'Kelly v. Bodkin*, 3 Ir. Eq. Rep. 390.

(*r*) *Hutchins v. O'Sullivan*, 11 Ir. Eq. Rep. 443.

(*s*) *Bennett v. Bernard*, 12 Ir. Eq. Rep. 229.

(*t*) *Birmingham v. Burke*, 2 Jo.

& Lat. 114; see *Toft v. Stephenson*, 7 Hare, 1, as to what suits will not save the right of a vendor to a lien for the purchase-money.

(*u*) 12 Ir. Eq. Rep. 235.

(*x*) *Bennett v. Bernard*, 12 Ir. Eq. Rep. 236.

reconsidered in England he was not sure that it would be upheld. *Watson v. Birch* did not decide that *Sterndale v. Hankinson* would not be considered law even on a bill filed in England since the recent statute, but the judgment seemed rather to infer that if the case was similar to *Sterndale v. Hankinson* it would be otherwise. But however that might be, the cases in Ireland had established the rule as far as it had been carried, and were not to be disturbed. In a previous case (y) the same learned Judge expressed an opinion that *Sterndale v. Hankinson* applied equally to a case where the bill has been filed since the passing of the new act, but ultimately he was not called upon to decide the question.

11. Of course the statute must ultimately receive the same construction in both countries. Some passages of the judgment in *Berrington v. Evans*, taken without reference to the facts of that case, might seem to lay it down as a general rule, that a judgment creditor when the time has run against him cannot take advantage of a general creditors' suit, according to the rule laid down in *Sterndale v. Hankinson*; but the case of *Berrington v. Evans* itself was properly decided, and the Chief Baron did not intend to lay down a general rule: he said that he was not prepared to say whether if he could be satisfied that the Bill was filed with the consent of the judgment creditor, and he meditated, like the plaintiff, to prosecute his claim under that bill—whether under such circumstances he should arrive at a different conclusion. Even then, he apprehended, he would have to give a satisfactory reason for remaining so long without calling in the aid of the court in

(y) *Carroll v. Darcy*, 10 Ir. Eq. Rep. 321.

his own person. We may observe that the case was a clear one against the creditor ; his debt was a judgment of 1813 ; the Bill was filed in 1821, after the debtor's death ; there was an apportionment of the fund in 1831, and the application of the judgment creditor was not made until 1835,—22 years after his judgment,—alleging ignorance of his rights, and of the proceedings, and that further assets had been paid into court since 1831. Perhaps therefore we may be justified in considering *Sterndale v. Hankinson* as still law in both countries, although the rule is to be cautiously applied since the new act. The suit must in effect be the suit of the creditor, one under which he would have a clear right to prosecute his demand, and of which he was fully aware, and his demand must be such as would not have been barred if he had himself filed the Bill actually before the Court ; and irrespective of the statute, he would be bound, in order to avail himself of the suit, to conform to the general orders of the Court, and not to be guilty of gross laches.

12. The 40th section now under consideration has been held to apply to a judgment even where it is sought to be enforced against the personal estate only. *Shadwell, V. C.*, in deciding this point, said that the language of the section was general. There was nothing to confine its meaning to a judgment which, owing to the nature of the assets of the party indebted, might affect land, but could not operate on personal estate (I). The intention of the Legislature was that no proceeding whatever should be taken on a judgment after the

(I) The Vice-Chancellor probably said that there was nothing to confine the meaning to a judgment which there were no real assets to answer, but which could be paid out of personal estate.

lapse of 20 years from the time when the money secured by it became due, unless some payment should have been made on account of it, or some acknowledgment should have been given in writing within the period of 20 years (2). This perhaps is not a just exposition of the statute, for the provision relates to any sum of money secured by judgment, &c., or otherwise charged upon or payable out of any land or rent ; but as one remedy, viz. that against the land, is barred by the statute, the remedy against the personal estate is held to be barred also ; for if the action is brought so as to charge the personal estate, the answer is obvious : “ You have brought your action in respect of a sum of money charged upon or payable out of real estate, you are therefore within the terms of the act, and consequently your right is barred.” The personal estate may be an additional security to such a creditor, but however numerous his securities they could not carry his right farther ; if his remedy under the real security is gone, it is also barred in respect of all the other securities (a).

13. Where a mortgagee, with a covenant from the mortgagor to pay the debt, joined in 1817 with the mortgagor in postponing his mortgage in favour of another creditor, and the estate was conveyed to the latter to secure in succession the several debts, and he, under the trusts, sold it in 1834, and applied the purchase money in *part* reduction of his own debt ; the original creditor was, upon a bill filed in 1842, held entitled to the benefit of an equitable assignment made to him in 1817 of future personalty to secure his debt, notwithstanding that there was no specific acknow-

(2) *Watson v. Birch*, 15 Sim. 523.

(a) *Henry v. Smith*, 2 Dru. & War. 391, *per Curiam*.

ledgment of the debt after the execution of the assignment, and the bill was not filed until twenty-five years afterwards, for the assignment was only a collateral security in aid of the trust to sell the estate: it was intended to secure the debt, and ought to be considered operative as long as the debt existed, and having regard to the circumstances attending the debt, the covenant, the mortgage, and ultimately the trust to sell, it was held that the debt, and the personal remedy to recover it, subsisted at the time the bill was filed, and also that the assignment was then operative (b).

14. And where a tenant for life paid off a charge, but took no step to keep the charge alive, and more than twenty years elapsed in his lifetime, as the charge still enured to his benefit, it was held that the right was not barred by section 40; for the statute cannot be applied to a case where there is no assignable person liable to pay the charge, no person who by the delay could be induced to suppose that the charge was abandoned or merged, and where the rent out of which the interest of the charge ought to be paid is receivable by and belongs to the same person who is entitled to the interest (c).

15. And to bring a charge within the operation of this section, there must be a hand to receive as well as a hand to pay, and the party to receive must be capable of releasing and giving a discharge (d).

16. Where a judgment is entered on a *post obit* bond, time of course does not begin to run until

(b) *Bennett v. Cooper*, 9 Beav. 252.

(c) *Burrell v. Lord Egremont*, 7 Beav. 205.

(d) *McCarthy v. Daunt*, 11 Ir. Eq. Rep. 29.

after the death of the life on the dropping of which the payment depends (*e*).

17. A vendor's lien on the estate sold for the purchase money is within the 40th section, and therefore will be barred by twenty years' possession; and as it is only a constructive trust as between the vendor and purchaser, it does not fall within the 25th section (*f*).

18. In regard to legacies, it has been decided that a legacy payable out of personal estate is within this section as well as a legacy charged on real estate (*g*); and a residue is deemed a legacy within the meaning of the clause (*h*). But although the right of the residuary legatee may be barred as to assets possessed by the executor more than twenty years before the filing of the bill, yet as to assets possessed since that time, and within twenty years, the remedy remains (*i*).

19. And where a legacy is given to one for life, and after his death to another, time will not run against the latter until the death of the tenant for life (*k*), for until then the legatee in remainder had not a present right to receive the same. So where the legacies are charged on property subject to prior charges, which require for a time all the produce, so that the legatees are not in a position to claim payment of their legacies, time will not run against them until the prior charges

(*e*) *Barber v. Shore*, 1 Jeb. & Sy. 610; *Tuckey v. Hawkins*, 4 Com. Ben. Rep. 655; vide *post*, *Williams v. Welch*, 3 Dowl. & Lown. 565.

(*f*) *Toft v. Stephenson*, 7 Hare, 1; see *supra*, p. 99, pl. 5.

(*g*) *Sheppard v. Duke*, 9 Sim. 567; 2 Dru. & War. 391; see *post*, pl. 33.

(*h*) *Prior v. Horniblow*, 2 You. & Coll. 200; see *Christian v. Devereux*, 12 Sim. 271; *Adams v. Barry*, 2 Coll. C. C. 285.

(*i*) *Adams v. Barry*, 2 Coll. C. C. 290.

(*k*) *Prior v. Horniblow*, 2 You. & Coll. 200.

are satisfied (*l*). But where an infant was entitled under a will to a legacy, time was held to run from the period when she attained twenty-one; and it was not revived by the executor, who had possessed assets charging his real estates by his will with his debts (*m*).

20. The section under consideration excepts from its operation cases where in the meantime some part of the principal money or some interest thereon has been paid, and the twenty years run only from the last of such payments (*n*). In *Brocklehurst v. Jessop* (*o*) it was held that an equitable mortgagee, who entered into possession of the estate, and received the rents and applied them as far as they would extend in payment of the interest, was entitled to go for the deficiency against the general assets of the mortgagor, because the receipt of the rent was a payment within the meaning of the proviso in the 9 Geo. 4, c. 14 (I). In a later case, in which a mortgagee with a bond from the mortgagor to secure the mortgage money entered and received the rents, Alderson, B., upon *Brocklehurst v. Jessop* being cited, observed that such a receipt might keep the mortgage alive, but

(*l*) *Faulkner v. Daniel*, 3 Hare, 212; see sect. 42.

(*m*) *Piggott v. Jefferson*, 12 Sim. 26.

(*n*) See *Vincent v. Willington*, Long. & Town. 456.

(*o*) 7 Sim. 438.

(I) Section 1, which enacts what acknowledgment shall alone be sufficient evidence of a new or continuing simple contract, has a proviso "that nothing therein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever."

quære whether it kept the bond debt alive (*p*). In *Williams v. Welch* (*q*), however, where an annuity was *collaterally* secured by a judgment, although more than twenty years had elapsed the judgment was allowed to be revived by *scire facias*, because payments of the annuity had been made within the twenty years, and this appears to be the true view of the statute; and Mr. Justice Ball, in Ireland, stated that he believed that there was no question but that a payment on account of a collateral mortgage would take the judgment out of the statute; he said so with all due deference to the reporter's *quære* in *White v. Hillacre* (*r*) (I).

21. The section under consideration also contains an exception where in the meantime some acknowledgment of the right to the principal or interest (II) shall

(*p*) *White v. Hillacre*, 3 You. & Coll. 307. (*r*) 9 Ir. Law Rep. 385; see Archbishop of Dublin *v.* Lord

(*q*) 3 Dowl. & Lown. 565, *infra*, Trimleston, 12 Ir. Eq. Rep. 251. s. 8, pl. 2.

(I) The 8 Geo. 1, c. 4, s. 2, Ir., provided a plea in bar of any action for recovery of any debt due by bond, judgment, &c., which should have been due for twenty years, where no interest or money had been paid, or other satisfaction made on account thereof within twenty years. Upon this statute, where two bonds were given at the same time, severally by two persons to secure the same debt, and two judgments were entered up thereupon at the same time against each severally, it was held that proceedings within twenty years against one of the judgment-debtors took the case out of the statute as regarded the judgment against the other; and Burton, J., said, suppose there had been a mortgage collateral with a judgment given for the same debt, could it be contended that a proceeding upon the deed of mortgage would not be a proceeding to recover the debt due by the judgment? *Mahon v. Davoren*, 2 Hud. & Bro. 523; and see *O'Shee v. Warrens*, 5 Law Rec. N. S. 77; 1 Jeb. & Sy. 504.

(II) "Unless in the meantime some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right *thereto*," &c.

have been given in writing, signed by the person by whom the same shall be payable or his agent, to the person entitled thereto or his agent, and the remedy is enlarged to twenty years after such acknowledgment, or the last of such acknowledgments was given. And this applies to all the monies provided against by the section; and the like exception is contained in section 42, which will shortly come under our consideration.

22. In *Lord St. John v. Boughton (s)*, where the debtor upon bonds devised his estates to trustees to pay his debts, &c., and the residue to be in trust for her son and his children, letters written by the surviving trustee to the creditor after the son's death, amounting to an acknowledgment of the debts, were held to be binding, as the trustee was held to be the agent of the person by whom the same were payable: the Vice-Chancellor observed that all that the act requires is that *some* acknowledgment of the right to the sum claimed shall have been given in writing, &c. The act, therefore, allows of considerable latitude as to the form of the acknowledgment; and consequently it is not necessary that it should state the amount of the sum alleged to be due. If it refers to the thing in question it is sufficient. The trustee, who is the party by whom the money is payable, may acknowledge the debt, by a writing signed by himself or his agent, but such an acknowledgment will not impose on him any personal liability to pay the debt.

23. Letters, although properly signed, will not amount to an acknowledgment, if their object is not to admit or show that the writer was himself liable to the demand, but to fix the liability on a third person; and

(s) 9 Sim. 219.

to be binding they must be written to the party entitled to make the claim (*t*); and there must be in the letters that from which a continuing contract may be inferred. If a man were to write a letter to a third person, acknowledging the debt, it would not take it out of the statute (*u*). The decisions upon the previous sections (14 and 28) apply equally to this section in regard to an acknowledgment to an agent (*x*).

24. In the case of *Lord St. John v. Boughton*, before referred to, the trustee, Thomas Townsend, sent a letter to the creditor, which amounted to an acknowledgment of the demand, and which stated that a severe attack of gout in the hand obliged him to employ an amanuensis; and the letter concluded, "I am, &c., for Thomas Townsend, *L. T.*" It was sworn that this letter was written by Laura, the daughter of the trustee, according to her father's dictation, and that it was signed by her in his presence, and it was held to be a compliance with the statute (*y*).

25. It was observed in *Blair v. Nugent*, that as to acknowledgments, the cases show that the Court has not restricted itself within narrow limits. If it be made in a schedule [to a deed, or in the Insolvent Court], affidavit, or answer, it is sufficient, although it might be said that in those cases it is made to the Court, and not to the party. The decisions proceeded upon a liberal, but yet a fair and just construction of the statute (*z*).

(*t*) *Holland v. Clark*, 1 You. & Coll. C. C. 151.

(*u*) 2 You. & Coll. 676, *per* Alderson, B.

(*x*) *Supra*, p. 68, pl. 74; p. 113, pl. 30.

(*y*) 9 Sim. 226.

(*z*) 3 Jo. & Lat. 677; *McCarthy v. O'Brien*, 2 Ir. Law Rep. 67; *Rawson v. Moore*, 2 Jeb. & Sy. 601; *Tristram v. Harte*, Long. & Town. 186; *Barrett v. Birmingham, Flan. & Kel.* 556; see *Smith v. Poole*, 12 Sim. 17, a case on 9 Geo. 4, c. 14.

26. Where two persons advanced a sum of money by way of salvage money to save a forfeiture, and one of them filed a bill against the owners of the estate and made the other creditor a defendant, and there was an admission of the debt in the answer of the owner, it was objected as regarded the right of the creditor, who was a defendant, that the acknowledgment was not made to the party or his agent, because the person to receive the money was not the person who filed the bill to which the answers were put in : the objection was overruled, and the admission was held to be an acknowledgment in writing within the meaning of the statute, and to have saved the bar of the statute (*a*).

27. Where a reference was made to the Master in suits in which the conusor of a judgment was a defendant, but the conusee of it was not, and the reference was with the assent of the conusor, and the Master in pursuance of the order took the account of debts and reported how much was due to the conusee on the judgment, and that the same was a charge upon the freehold lands of the conusor; upon the pleadings it was held at law that the Master's report was not an acknowledgment in writing, and that the Master was not an agent of the parties interested in the report or in the judgment. The act contemplated, the Court said, such a voucher in writing as could be given by one party and received by another, for the purpose of evidencing between them the existence of the right: and the agent contemplated would seem to be an agent acting directly under the authority of his principal, and doing an act which the principal, had he been present,

(*a*) *Blair v. Nugent*, 3 Jo. & Lat. 673.

might himself have done (*b*). It has been observed that in this case the creditor who was held to be barred was not a party to the suit, and that a suit in equity properly instituted would prevent time from running, and that a court of law ought to act upon that principle (*c*). The case appears to have been decided upon the pleadings, merely on the question whether the report was a sufficient acknowledgment in writing within the meaning of the act, without reference to the question whether the report, which was made with the privity and assent of the conusor, did not confer a new right to receive the money secured by the judgment as fully as a judgment of revivor would have done, the debtor being a party to the report, and consequently bound by it; and upon that ground the decision in *Hill v. Stawell* has not been deemed satisfactory (*d*).

28. It remains to observe that where there is an express trust within the 25th section, which we have already considered, the case is taken out of the 40th section, and time does not run (*e*).

29. After the 31st December 1833, no arrears of dower, nor any damages on account of such arrears, can be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit (*f*).

(*b*) *Hill v. Stawell*, 2 Jeb. & Sy. 389; see *supra*, pl. 8; *Harrison v. Duignan*, 2 Dru. & War. 302; where a Master's report in a minor matter of the liability of the estate to an annuity was held not to deprive the minors of the benefit of the statute.

(*c*) 3 Dru. & War. 123; and see 9 Ir. Law Rep. 374.

(*d*) *Barrett v. Birmingham, Flan. & Kel.* 564—566.

(*e*) *Supra*, sec. 6, pl. 9—20.

(*f*) Sec. 41.

30. And after that day, no arrear of rent (*g*) or of interest, in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy or any damages in respect of such arrears of rent or interest, can be recovered by any distress, action, or suit, but within six years next after the same respectively became due, or next after an acknowledgment of the same in writing has been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent. But nevertheless where any prior mortgagee or other incumbrancer has been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit is brought by any person entitled to a subsequent mortgage or incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which became due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the term of six years (*h*).

31. This section, as to an annuity, contemplates and provides for the case where the title to the annuity is not disputed, but the distress is made for the arrears due (*i*).

32. It extends to interest on money charged on land, which falls within section 40 (*j*), but it does not include turnpike tolls; for the word "land," either in

(*g*) See *Paget v. Foley*, 2 Bing. N. C. 679.

(*h*) Sec. 42.

(*j*) See *Burne v. Robinson*, 1

(*i*) *James v. Salter*, 2 Bing. Dru. & Wal. 688; *Dillon v. Cruise*, N. C. 544. 3 Ir. Eq. Rep. 32.

its usual and proper meaning, independently of the act, or according to the extended meaning directed by the act, cannot be held to mean the tolls payable for the use made of a turnpike road (*k*).

33. And it has been decided that this section does not extend to an annuity given by will, which is payable out of personalty, and no charge upon land (*l*); but this seems altogether inconsistent with the decision that section 40, which was not referred to, does include legacies charged only on personal estate (*m*), for the personal annuity was of course a legacy within the act: in each section the word "legacy" follows the words "money charged upon or payable out of any land or rent." The learned Judge said that this was not a charge upon land within the 42d section; but according to the decisions upon the 40th section, a legacy will fall as to interest within the 42d section, although not charged upon land: it does not appear possible, without doing violence to the words, to put a different construction in this respect on the two sections.

34. After some conflict of opinion, it appears to be decided that this section includes interest on judgments as well as mortgages; and where the right to recover against the real estate is barred, the right to recover against the personal estate is also barred (*n*). The 40th section deals with the right to recover the principal sum; this 42d section deals in like manner with the interest thereon. Judgments are expressly

(*k*) *Mellish v. Brooks*, 3 Beav. 22, *per Curiam*.

(*l*) *Roch v. Callen*, 6 Hare, 531.

(*m*) *Supra*, pl. 18.

(*n*) *Kealy v. Bodkin, Saus. &*

Scul. 211, *contra*; but see *O'Kelly v. Bodkin*, 2 Ir. Eq. Rep. 361; 3

Ir. Eq. Rep. 390; *Henry v. Smith*, 2 Dru. & War. 331; *Du Vigier v.*

Lee, 2 Hare, 326, *supra*, pl. 12.

named in the 40th section, and they are in their nature in effect charges on real estate, and interest may be recovered upon them, and they are made securities for interest as well as principal. It is in this sense that judgments are dealt with in section 40. Now section 40 enumerates mortgages, liens, judgments; but section 42 adopts the previous general description of money "charged upon or payable out of land," a description which includes every security, omitting the enumeration, which it was unnecessary to repeat. The enactments are identical. It is impossible to draw any distinction between the sums of money mentioned in the one section and in the other.

35. The 3 & 4 Vict. c. 105, s. 26, provides interest on every judgment debt not confessed or recovered for any penal sum, for securing principal and interest; and this provision, although by a later statute, is subject to the statute of limitations (*o*).

36. Upon this section (42), as upon section 40, it is settled that where there is an express trust, the 25th section applies, and the claim is unaffected by the section under consideration (*p*).

37. There is no saving in section 42 for infancy or other disability, nor has it any words corresponding with those in section 40, which limits the right of action, &c. to twenty years "next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same." Even as to legacies payable out of real estates, there is no saving for infancy. In the case of younger

(*o*) *Henry v. Smith*, 2 Dru. & War. 391, 392.

(*p*) *Gough v. Bult*, 16 Sim. 323; *supra*, sec. 6, pl. 9—21; sec. 7, pl. 23.

children's portions, although given by way of legacy, the interest is often allowed to remain in arrear, for the accommodation of the head of the family; and if the statute is to receive a strict construction, a just claim will often be unnecessarily barred, and ultimately to the injury of the person whom the rule was intended to benefit. Whether a legacy be payable out of real or personal estate, interest upon it, where it carries interest, ought not to be barred during the infancy of the legatee (I). The 40th section saves the right when some part of the principal money, or some interest thereon, shall have been paid; but there is no exception in section 42, which would make the payment of a portion of a year's interest save the right to the residue; but the right is preserved, if prosecuted within a year, to all the arrears which have accrued during the possession of a prior incumbrancer. An attentive consideration of the two sections will probably satisfy the learned reader that the two provisions are altogether distinct as regards time, and that no aid

(I) In *De Beauvoir v. Owen*, 5 Excheq. Rep. 166, where time was held to run, in the case of a quit-rent, from the day on which the last payment was made, and not from the time when the right to distrain first accrued, the Court of Exchequer Chamber, in giving judgment, observed that there did not seem such a contradiction between the probable intent of the legislature and the construction of the words of the act adopted by the Court of Exchequer as made it necessary to have recourse to a forced construction to reconcile the words and the intent. The inconvenience of a person coming under a disability after the receipt of rent, and before the right of action, &c. accrued, was more substantial; but the legislature, in passing this act, had in a much more important instance left the rights of persons unprotected, inasmuch as sect. 42, which bars the recovery of arrears after six years, has no proviso in favour of such persons, 5 Excheq. Rep. 182; see *Humfrey v. Gery*, 7 Com. Ben. Rep. 567.

can be borrowed from the 40th section in favour of an extension of the 42d :

The 40th section.

No proceeding to recover the principal but within twenty years after a present right to receive the same shall have accrued to some person capable of giving a discharge, unless in the meantime,

1. Some part of the money, or some interest thereon, shall have been paid,
2. Or some acknowledgment shall have been given.

The 42d section.

No interest to be recovered but within six years after the same shall have become due,

1. Or there shall be an acknowledgment,
2. Or a prior incumbrancer shall be in possession.

38. Even a judgment creditor of a remainder-man in fee can only recover six years' interest, although the tenant for life or his incumbrancers have all along been in possession (*q*).

39. The acknowledgment required to take a case out of the operation of section 42 being similar to that in section 40, it is here necessary to refer on that head only to the decisions already considered (*r*).

40. Upon the construction of section 42, coupled with section 40, no serious difficulty could have arisen ; but that by an act of the same session, passed *after* the act chap. 27, but to which operation was given from a

(*q*) Vincent *v.* Goings, 1 Jo. & Lat. 697.

(*r*) *Supra*, pl. 21—27.

date prior to the time when the act chap. 27 passed (I), it was enacted that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty (II), shall be sued within twenty years after the cause of such actions or suits (*s*); and it contains savings in case of disabilities, and gives effect to acknowledgments in writing and part payments of any principal or interest (*t*).

41. A question arose whether section 42 of chapter 27, which we have been considering, extends to rents reserved by lease and secured by covenant. It was unnecessary to decide it, because the remedy was held to fall within the 3d section of the 3 & 4 Will. 4, c. 42, s. 3, and the savings which follow it, to which we have just referred.

42. But if it had not been for the later statute, (ch. 42,) Tindal, C. J., thought the case would not have fallen within the former. He referred to the title of the act (*u*), which seemed more pertinent to rents that are a charge upon the land than to mere conventional rents. Then a reference to the rents specified

(*s*) Sec. 3.

(*t*) Sections 4, 5.

(*u*) See 1 Mac. & Gor. 651; the title cannot be resorted to in construing the enactments.

(I) The 3 & 4 Will. 4, c. 27, received the royal assent on the 24th of July 1833, and was to come in force on the 1st of January 1834; that of c. 42 on the 14th August 1833, but was directed to take effect on the 1st June 1833 (s. 44). It is manifest that the two acts were not framed by the same persons; 3 Dru. & War. 491. The framers of the later act (c. 42), appear to have been ignorant of the former act (c. 27); for in s. 7 they make a provision extend to the old statute of limitations, 21 James 1, without any reference to the one just passed.

(II) Distresses are not limited by the 3 & 4 Will. 4, c. 42, but they are by the 3 & 4 Will. 4, c. 27; *per* Maule, J., 7 Com. Ben. Rep. 580.

in the first section shows, that the arrearages of rent mentioned in this section (42) have no relation to a conventional rent reserved upon a lease. In section 2 it was clear, that the word *rent* was used to express charges for which an assize would lie,—rents which were a charge on the land. Section 36 goes to abolish all real and mixed actions. Section 40 enacts, that money charged on land shall be deemed satisfied at the end of twenty years if there be no interest paid or acknowledgment. It was said that section 41, which relates to dower, enacts that no arrears of dower should be recovered for more than six years, and that when section 42 follows, by enacting that no arrears of rent or interest shall be recovered for more than six years, we must intend that the legislature proposed thereby to include all other kinds of rents. But the C. J. should say, it was proposed to include other rents of the same nature as those to which the act according to its title and preamble was intended to apply, rather than conventional rents reserved upon a lease. Park, J., inclined to think that this was a case not intended to be included in this act, but he abstained from giving any express opinion on the point. But Bosanquet, J., said, that if the case had rested on that statute, and the second had never passed, he should have thought the right to recover had been confined to six years. The first section enacts, that the word *rent* shall extend to all heriots and to all services and suits for which a distress may be made. It appeared to him, that that must include rent service. The second section appears to relate to the recovery of an estate in the rent, and after limiting twenty years for the recovery of an estate in the rent, other provisions are introduced as to the

recovery of arrears. Section 40 relates to principal money charged upon land. Then comes section 42, which it was contended did not apply to rent reserved by specialty. But if we look to the words with which arrears of rent are associated, it seems difficult to confine the expression to rent reserved by parol agreement, for interest could not be made a charge on land by parol, and there was no limitation but this for the recovery of arrears, whether due by parol or on specialty.

43. The decision however was, that the case fell within the later act, and the opinions of the Judges are here given with a view to the general construction of this important section, where it is not repealed or affected by the subsequent statute. Mr. Justice Bosanquet's appears to be the true view; but for the difference of opinion expressed by such high authorities, the writer would have thought the point a clear one (I).

44. The same rule extends to a rentcharge. This was decided in the later case of *Sims v. Thomas* (x), where there was a grant of an annuity charged upon land, and a covenant to pay the annuity to the grantee, and the declaration alleged a breach of covenant, and the question upon the two acts was, whether the period of limitation was six years or twenty years; the Court of B. R. said that the Court of C. P. had decided,

(x) 12 Adol. & Ell. 536; see 3 Dru. & War. 491, 492.

(I) The point was so decided in Ireland, to which at that time c. 27 did, and c. 42 did not extend: *Bruen v. Nowlan*, 1 Jeb. & Sy. 346, n.; see 3 Dru. & War. 492, 493; *Grant v. Ellis*, 9 Mees. & Wels. 113. There was then no conflict of statutes. The 3 & 4 Vict. c. 105, s. 32, extends to Ireland in effect the provision in 3 & 4 Will. 4, c. 42. The law, therefore, is now the same in both countries.

in *Paget v. Foley*, that if covenant be brought on an indenture of demise, the period of limitation is twenty years, and they entirely concurred in that decision. The covenant was not, they said, the usual case of reservation of rent upon a lease, and so far it was not properly an indenture of demise; it was a rentcharge, and as such fell within section 42 of chapter 27. But notwithstanding that, they were of opinion that it fell within the 3d section of chapter 42, as being an action of covenant on a specialty.

45. The last exception in section 42 of chapter 27 is, when a man has an estate and there are several incumbrancers on it, and one of the incumbrancers enters into possession, there another creditor shall not be prejudiced by that possession if he come for relief within a year after the prior creditor has been removed from the possession (I). The enactment in other respects is absolute and positive that no arrears of interest shall be recovered within the time specified. Therefore, as we have seen, a judgment creditor of a remainder-man in fee can only recover six years' interest, although the tenant for life or his incumbrancers have all along been in possession (y). The Court observed that this was a case of a totally different nature from that provided for by the statute, for here was an estate for life not bound by the judgment, and a remainder which was bound by

(y) *Vincent v. Going*, 1 Jo. & Lat. 697; see *Drought v. Jones*, 2 Ir. Eq. Rep. 303, which seems a doubtful authority.

(I) In *Du Vigier v. Lee*, 2 Hare, 333, Wigram, V. C., observed, in reference to the observations to which the statute was open, that the proviso in the 42d section in favour of mortgagees did not by any means adequately provide for the various cases for which, where there are several mortgagees upon the same estate, provision was necessary, and was obviously meant to be made.

it ; the case therefore was not within the exception, for the judgment creditor of the remainder-man had no right to enter into possession of the estate during the life of the tenant for life, even supposing the possession had been vacant. The act does not say that if the creditor could have had a remedy against the lands and neglected to avail himself of it, he shall only recover six years' interest, but it is absolute and positive that no arrears of interest shall be recovered but within the time specified ; and then the exception states the only case in which the Legislature intended to relieve the creditor from the effect of the previous enactment. The Judge added that he was not embarrassed by the provisions of the 3d section of the 3 & 4 Will. 4., c. 42, for this was a proceeding upon a judgment, not upon a bond or covenant. He must say that it was most desirable that the legislature should clear up the difficulties which they had themselves created, for it seemed difficult to reconcile the two statutes.

46. The possession of a judgment creditor would be the possession of an incumbrancer within the proviso in section 42 (z).

47. Where there were two subjects to deal with, a principal sum falling within the 40th section, and interest on it falling within the 42d section, a serious difficulty arose in consequence of the 3d section of chapter 42 (a) (I), and this of course affected the question of arrears of interest on mortgage money :

(z) 3 Ir. Eq. Rep. 408 ; 2 Dru. & War. 390 ; and see 2 Hare, 333.

(a) 3 Dru. & War. 492.

(I) In a case in Ireland it was observed by the Court, that in both *Paget v. Foley* and *Strachan v. Thomas*, there was but one subject, the rent in the one and the rentcharge in the other ; it was therefore impossible

48. Where the mortgage was of a canal, without any covenant or engagement to pay, it was decided that the case fell within the 42d section of chapter 27, and that no more than six years' arrear of interest could be recovered (*b*). That certainly was a case to which the 3d section of chapter 42 could not apply.

49. In the early part of 1843 the question arose in Ireland, whether in case of a charge or mortgage with a covenant for payment, the provision as to actions of covenant in the later act (*c*) enlarged the remedy of the creditor as to interest, and it was held that the case fell wholly within the 3 & 4 Will. 4, c. 27, and was not affected by the later statute, and therefore that six years' arrear of interest only could be recovered (*d*).

50. The day after this decision the same point came on for argument in England, and after full consideration it was decided that the case fell within the 3d section of chapter 42, and therefore that the arrears could not be confined to six years (*e*). It was not then known that the point had been ruled otherwise, but in a later case before the same learned Judge, the decision in Ireland was thought to have turned upon the distinction

(*b*) *Hodges v. Croydon Canal Company*, 3 Beav. 86; see 3 Dru. & War. 493.

(*c*) 3 & 4 Vict. c. 105, s. 32, the same as 3 & 4 Will. 4, c. 42, s. 3.

(*d*) *Hughes v. Kelly*, 3 Dru. & War. 482; see 1 Mac. & Gor. 650.

(*e*) *Du Vigier v. Lee*, 2 Hare, 326.

to say there could be a recovery of the same subject both within twenty years and within six years; 3 Dru. & War. 492. Where the right falls within the 3d section of the 3 & 4 Will. 4, c. 42, there is only one limit, which is twenty years; where the right falls within the 2d and 42d sections of the 3 & 4 Will. 4, c. 27, the distress or action must be brought within the twenty years, under s. 2; but the extent of the arrears to be recovered is, by s. 42, restricted to six years.

between the English and Irish cases (*f*), and the point was again decided in favour of the application of the later statute. But upon appeal the case was held to fall wholly within chapter 27, and therefore that six years' arrear only could be recovered (*g*). This sets the point at rest. The construction is, by reconciling the two provisions to consider the first act as applicable only to the land, and the latter as applicable only to the person.

51. Where the owner in fee of a fee farm rent granted by the Crown, which had been paid up to 1831, but no further, had a commission of lunacy issued against him in 1841, and his lunacy was carried back to 1805 by the finding of the jury, and he sought, together with his committee, to recover six years' arrears of the rent, to be computed from the last payment thereof, and twenty years had not expired since the last payment, it was yet held that the right to recover such arrears was barred by the 42d section of chapter 27, which was not repealed by the 3d section of chapter 42 (*h*) (I).

(*f*) There appears to be no distinction between them.

(*g*) *Hunter v. Nockolds*, 1 Mac. & Gor. 640.

(*h*) *Humfrey v. Gery*, 7 Com. Ben. Rep. 567; see p. 528.

(I) The ordinary form of expression in statutes of limitation, in the 21 Jac. 1, for instance, is that all actions shall be commenced within a certain limited period, and not after. The phraseology of the 3 & 4 Will. 4, c. 27, s. 42, is that no arrears of rent, &c. shall be recovered but within six years next after the same shall have become due, &c., not that you must bring your action within six years, but that you must recover the arrears within six years, or not at all. The 41st section, which without any exception or limitation enacts that no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit, tends to throw a little

by c. 42, s. 42, where there was a mortgage with covenant to pay principal or interest. It was held that the land was not charged with six years' arrears of rent under the 3 & 4 Will. 4, c. 27, s. 42; but that arrears might be recovered on the covenant under the 3 & 4 Will. 4, c. 42, s. 43. And that in such a case the suit by the heir of the mortgagor against the mortgagee may be brought on the covenant as against the mortgagee. But seems if the suit were by the mortgagor himself, doubtful.

52. Before we close this subject it may be useful to refer shortly to some of the decisions on pleading. A defendant who intends at the hearing to insist upon the statute of limitations must set up that defence upon the pleadings, for otherwise the plaintiff would be taken by surprise, and might lose the opportunity of showing something which would avoid the bar created by the statute (*i*). The defence may be by plea or demurrer, as the case may require (*k*). But a party insisting upon the statute of limitations, as a bar to a demand against him, must set up that defence upon the first opportunity, otherwise a party

(*i*) *Harrison v. Borwell*, 10 Sim. 382 ; *Roch v. Callen*, 6 Hare, 531.

(*k*) *Hoare v. Pick*, 6 Sim. 51 ; *Plunket v. Lord Burlington*, 3 You.

& Coll. 275, n. ; *Bampton v. Birchall*, 5 Beav. 76 ; *Ferguson v. Livingston*, 9 Ir. Eq. Rep. 262.

light on the subject. 7 Com. Ben. Rep. 587, 588, *per* Maule, J. The reason why the usual phraseology in statutes of limitation was not adopted in the late one seems to be, that ss. 2 and 40 of that statute, for example, limited the period within which the distress or action or suit was to be made or brought or instituted ; and s. 42 limited the right to recover more than six years' arrears ; but it could hardly be held to mean that you must *recover* the arrears *within* six years or not at all : the meaning of the statute is, that in the distresses or actions or suits made or brought or instituted, you shall not recover more than six years' arrears : this view is strengthened by the 41st section, to which the learned Judge referred. In the same case the same learned Judge asked, May not effect be given to the 3 & 4 Will. 4, c. 27, s. 42, and the 3 & 4 Will 4, c. 42, s. 3, in this way, by holding the right to recover the rent to be limited to six years, provided twenty years have not elapsed since the title first accrued, and after that period has elapsed to be gone altogether ? *Id.* 588. But it seems that the 3 & 4 Will. 4, c. 27 (ss. 2 and 42), alone would have this operation without being enlarged or restricted by the 3 & 4 Will. 4, c. 42, s. 3. It should be observed, that in *Humfrey v. Gery* the counsel for the defendant admitted the plaintiff's right to recover six years' arrears, although not the six years from the last payment, which would have, in effect, given to the plaintiff a right to recover all the arrears.

At the hearing of a claim a defendant may avail himself of the Stat. of Limitations without having pleaded it. See Neal v. Neal, 10 Jan. 72

might be contesting a question of right when in fact there was no legal question to be decided; for if the statute be a bar the cause ought to stop when the defence is set up (*l*). It has been held that a claim in an answer to the benefit of the "statute" generally of limitations is sufficient to give the defendant the benefit of the particular statute of limitations which is applicable to his case (*m*). Where the first proceeding is *ex parte*, as under the receiver's act in Ireland, the defence on the statute may be taken before the Master, but the creditor cannot lie by and take the objection after the Master has investigated the case (*n*), nor can he take the objection before the Master if being a defendant and having answered he has omitted to rely on the statute (*o*). The pleader at law should both state the commencement of the period of limitation and negative the cases of exception in the act (*p*). And if the party has obtained a new right by a judgment of revivor on a *scire facias*, which saves the bar, he must plead that judgment, and will not be allowed to plead a later judgment of revivor, which standing by itself would be too late to save the bar, and in his replication to rely upon the former (*q*).

(*l*) *Costello v. Burke*, 2 Jo. & Lat. 665.

(*m*) *Adams v. Barry*, 2 Coll. C. C. 290.

(*n*) *Costello v. Burke*, *ubi sup.*; see *Keogh v. Waring*, 5 Ir. Eq. Rep. 487.

(*o*) But see *Drought v. Jones*, 2 Ir. Eq. Rep. 303, which threw a

doubt on *Welsh v. Welsh*, 1 Jo. & Car. 232, without, it should seem, sufficient foundation.

(*p*) *Fortescue v. M'Kone*, 1 Jeb. & Sy. 341.

(*q*) *Farran v. Beresford*, 10 Cla. & Fin. 319; *Farrell v. Gleeson*, 11 Cla. & Fin. 702.

SECTION VIII.

OF CHURCH PROPERTY AND ADVOWSONS, AND OF THE LIMITS OF
THE ACT, AND OF MODUSES AND EXEMPTIONS.

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| <ol style="list-style-type: none"> 1. <i>Time for spiritual and eleemosynary corporations.</i> 2. <i>When time begins to run.</i> 3. <i>Advowsons.</i> 4. <i>Incumbents by lapse : by promotion to a bishoprick.</i> 5. <i>Estate tail in advowson.</i> 6. <i>One hundred years full period.</i> 7. <i>Limits of act : Spiritual Court included : Scotland and partially Ireland excluded.</i> 8. <i>2 & 3 Will. 4, c. 100, moduses or exemptions : 30 years : 60 years.</i> 9. <i>Corporations sole.</i> 10. <i>Enjoyment discharged of claim sufficient.</i> | <ol style="list-style-type: none"> 11. <i>Act operates in case of occupier ; not to disputed titles to ownership of tithes.</i> 12. <i>Is not repealed by the 2 & 3 Will. 4, c. 27 : several operation of the two acts.</i> 13. <i>Decrees.</i> 14. <i>What time shall be excluded.</i> 16. <i>Mode of pleading.</i> 17. <i>No presumption to be allowed upon enjoyment for less period.</i> 18. <i>Suits saved : Tihe Commutation Act.</i> 19. <i>Certain demises and compositions saved.</i> |
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1. THE Act enables any archbishop, &c., or other spiritual or eleemosynary corporation sole, to make an entry or distress, or to bring an action or suit to recover any land or rent within the following period next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress, or bring such action or suit, shall first have accrued ; that is to say, the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been

appointed thereto, if the times of such two incumbencies and such term of six years, taken together, shall amount to the full period of sixty years ; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will with the time of the holding of such two persons, and such six years, make up the full period of sixty years (*a*).

2. Where an ancient rent was payable out of lands *A.* and *B.*, and the owner of the lands sold *B.*, and indemnified the purchaser against the rent, and continued to pay the whole of the rent, no payment having been made by the purchaser of *B.*, and the period prescribed by this section (29) had elapsed, yet it was held that the purchaser's estate was still liable ; for by the very terms of this section the period of limitation is to commence when the right to make an entry or distress, or to bring an action or suit, has first occurred, and to ascertain this terminus, recourse must be had to the 3d section, which defines it to be when the person in possession or receipt of the rent shall, while entitled thereto, have been dispossessed, or have discontinued the possession or receipt of it. But here there was a continued receipt of the whole of the rent from the owner of *A.* and his ancestors, and as there was a common liability to its payment attaching on *B.*, all the payments made by the owner of *A.* are sufficient to prevent the bar of the statute from operating in favour of the owner of *B.* The statute never began to run (*b*).

(*a*) Sec. 29.

Lord Trimleston, 12 Ir. Eq. Rep.

(*b*) *Archbishop of Dublin v. 251, per Curiam.*

3. And no person can bring any *quare impedit* or other action, or any suit, to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as follows, (that is to say,) the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as with the times of such incumbencies will make up the full period of sixty years (*c*).

4. But it is provided, that when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by his Majesty or the ordinary, by reason of a lapse, such last-mentioned clerk will be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by his Majesty upon the avoidance of a benefice, in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk will, for the purposes of the act, be deemed a continuation of the incumbency of the clerk so made bishop, or in other words, the former will be within the provision in section 30, and the latter will not (*d*).

(*c*) Sec. 30.(*d*) Sec. 31.

5. And every person claiming a right to present to or bestow any ecclesiastical benefice as patron thereof, by virtue of any estate, interest, or right, which the owner of an estate tail in the advowson might have barred, will be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any *quare impedit*, action or suits will be limited accordingly (*e*).

6. But no person can bring any *quare impedit*, or other action or suit, to enforce a right to present or to bestow any ecclesiastical benefice, as the patron thereof, after the expiration of 100 years from the time at which a clerk has obtained possession of such benefice adversely to the right of presentation or gift of such person or of some person through whom he claims, or of some person entitled to some preceding estate or interest or undivided share or alternate right of presentation or gift, held or derived under the same title, unless a clerk has subsequently obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share, or right, held or derived under the same title (*f*).

7. The act is extended to the Spiritual Court (*g*) where no person claiming any tithes, legacy, or other property which might be recovered at law or in equity, is to have a longer time to recover the same than he has at law or in equity. But it is not to extend to Scotland, nor is it, so far as it relates to any right to present to or bestow any church vicarage or other

ecclesiastical benefice, to extend to Ireland (*h*) ; but this latter provision has since been altered (*i*).

8. By the 2 & 3 Will. 4, c. 100, " for shortening the time required in claims of *modus decimandi*, or exemption from or discharge of tithes " (I), it is enacted that all prescriptions and claims of or for any *modus decimandi*, or of or to any exemption from or discharge of tithes by composition real or otherwise, shall, in cases where the render of tithes in kind shall be demanded by the King, or by any duke of Cornwall, or by any lay person, not being a corporation sole, or by any body corporate of many, whether temporal or spiritual, be deemed good in law, upon evidence showing, in cases of claim of a *modus* the render of such *modus*, and in cases of claim to exemption showing the enjoyment of the land, without payment or render of tithes, money, or other matters in lieu thereof, for the full period of *thirty years* next before the time of such demand, unless, in the case of claim of a *modus*, the actual render of tithes, or of money, or other thing differing in amount, quality, or quantity from the *modus* claimed, or, in case of claim to exemption or discharge, the render or payment of tithes, or of money or other matter in lieu thereof, shall be shown to have taken place at some time prior to such thirty years, or it shall be proved that such payment or render of *modus* was made or enjoyment had by some consent or agreement

(*h*) Sec. 44.

(*i*) 6 & 7 Vict. c. 54; 7 & 8 Vict. c. 27; 8 & 9 Vict. c. 51.

(I) It does not extend to Ireland (sec. 9) ; as to the preamble, see 1 Mac. & Gor. 265.

expressly made or given by deed or writing; and if such proof in support of the claim shall be extended to the full period of *sixty years* next before the time of such demand, the claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or render of modus was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing (*k*). Upon which provision it has been observed that where it provides that if a modus has been paid for thirty years, it may be defeated by showing *the payment* of tithes in kind; that means the payment to any one; and the word must be used in the same sense in the subsequent part of the clause, so that a modus in the sense given by the act is as inconsistent with the render of tithe as it is according to its proper legal prescription (*l*).

9. And where the render of tithes in kind shall be demanded by any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other corporation sole, whether spiritual or temporal, every such prescription or claim shall be valid and indefeasible, upon evidence showing such payment or render of modus made or enjoyment had, as before mentioned, applicable to the nature of the claim, during the whole time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto: provided always, that if the whole time of the holding of such two persons shall be

(*k*) Sec. 1; see Dean and Chapter of Ely *v.* Cash, 15 Mees. & Wels. 647.

(*l*) 15 Mees. & Wels. 426; *per* Chief Baron.

less than sixty years, then it shall be necessary to show such render of modus made or enjoyment had, not only during the whole of such time, but also during such further number of years either before or after such time, or partly before and partly after, as shall with such time be sufficient to make up the full period of sixty years, and also during the further period of three years after the appointment and institution or induction of a third person to the same office or benefice, unless it shall be proved that such payment or render of modus was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing (*m*).

10. Where in answer to a suit by a vicar for tithes, the defendant proved non-payment for the period required by the act, but showed no legal ground for the exemption, it was held that this was no valid defence under the act. Upon this question there was a difference of opinion amongst the Judges, but finally Lord Cottenham, C., reversed the decree, and decided in conformity with the opinion of the great majority of the Judges, that under the act, the simple fact of enjoyment of the discharge claimed for the prescribed time is all that need be pleaded and proved as an answer to a demand for tithes (*n*).

11. A prescription for a lord of a manor to hold a manor freed from tithe, on payment to the rector of 40*l.* a year in lieu of all tithes within the manor, and that the lord, in consideration of that payment, should

(*m*) Sec. 1.

(*n*) *Salkeld v. Johnston*, 1 Hare, 196; 2 Com. Ben. Rep. 749; 2 Excheq. Rep. 256; 1 Mac. & Gor. 242; *Fellowes v. Clay*, 4 Adol. &

Ell. N. S. 313; *Lord Stamford v. Dunbar*, 13 Mees. & Wels. 822; see *Sheil v. Incorporated Society*, 10 Ir. Eq. Rep. 411.

have for himself, his heirs and assigns, from the occupiers of land within the manor, a tenth of all titheable matters within the manor, is not a *modus decimandi*, or exemption or discharge for tithes within the meaning of this statute (I). The question arose between the rector and the lord of the manor: the former claiming tithe against the latter. As there was a prescriptive title to a parcel of tithes, and the immemorial payment was a prescriptive rent for them, the statute was held not to apply. In truth, the Court observed, the contest was between the rector and the lord as to the title to a parcel of tithes admitted to be due from the occupier to some one. The statute was never meant to apply to disputed titles to the ownership of tithes, or to make a bad title to a parcel of tithes good. It was enacted in ease of the occupier who had not paid tithes in kind at all, but been totally exempt, or had paid something in lieu of it for a long period, and relief is given by shortening the time of prescription, and thus facilitating the proof of his title to exemption, or to pay the tithe otherwise than in kind (o).

12. In the Dean and Chapter of Ely *v.* Bliss (p), Lord Langdale, at the Rolls, held that the right to tithes as against an ecclesiastical corporation aggregate was barred by the 3 & 4 Will. 4, c. 27, by non-payment for twenty years. In answer to the objection that the effect would be to entirely subvert the act of the 2 & 3 Will. 4, c. 100, now before us, passed in

(o) Knight *v.* Lord Waterford, Waterford *v.* Knight, 11 Cl. & 15 Mees. & Wels. 419; see Lord Fin. 653. (p) 5 Beav. 574.

(I) Whether this prescription was a good one was not decided; 15 Mees. & Wels. 427.

ie q. raised under the 2 & 3 Will. c. 100 being whether a *modus decimandi* of 20th was payable to the rector in satisfaction & discharge of all tithes in R. & was become indefeasible by virtue of the Statute, the jury found the R. had been paid quarterly during the statutory period, not for tithes alone, but partly for tithes & partly for glebe & was proved that after the Statute the rector of R. had been in possession of glebe lands in R. & said that during the 20th was actually not payable in kind of tithes in R. & that in such finding there was no sufficient proof of any *modus decimandi* or payment in kind of tithes in R. (Young *v.* Clive Hall, 10 Jan. 81)

the preceding year for shortening the time required in claims of exemption from or discharge of tithes, he said he thought that they had different objects; but it was a sufficient answer to the objection to say that if two inconsistent acts be passed at different times, the last is to be obeyed; and if obedience cannot be observed without derogating from the first, it is the first which must give way. But upon an appeal, a case was directed to the Exchequer, and they certified their opinion to be that the tithes might be recovered notwithstanding the 3 & 4 Will. 4, c. 27. They were of opinion that they ought to confine the operation of the 2d section of that statute to cases where there are two parties, each claiming an adverse estate in the tithes: therefore a person who has received no tithes for twenty years cannot recover the possession of them from another who has for twenty years received those tithes from the terre-tenant. This construction reconciled the 3 & 4 Will. 4, c. 27, s. 2, with Lord Tenterden's act (2 & 3 Will. 4, c. 100) for shortening the time of prescription in such cases, and for limiting it in the case of tithes to a period of sixty years and three incumbencies; for the latter act clearly applies to the tithes as a chattel, and provides a limitation to protect the terre-tenant in his prescriptive mode of rendering them to the clergyman or tithe-holder. It was very improbable that the legislature could have intended, *sub silentio*, to have repealed so important an act so recently passed. Their construction, which they thought was the more reasonable one, had the additional advantage of reconciling both acts, and of removing what would otherwise seem an apparent neglect and carelessness on the part of the legisla-

ture (*q*). This certainly appears to be the sound construction of the two statutes.

13. And every composition for tithes which had been made or confirmed by the decree of any court of equity in England in a suit to which the ordinary, patron, and incumbent were parties, and which had not since been set aside, abandoned, or departed from, is made valid in law, and no modus, exemption, or discharge is to be deemed to be within the provisions of the act, unless the same is proved to have existed and been acted upon at the time of or within one year next before the passing of the said act (*r*).

14. But it is provided, that where any lands or tenements shall have been or shall be held or occupied by any rector, vicar, or other person entitled to the tithes thereof, or by any lessee of any such rector, vicar, or other person, or by any person compounding for tithes with any such rector, vicar, or other person, or of any such lessee or compounder, whereby the right to the tithes of such lands or tenements may have been or may be during any time in the occupier thereof, or in the person entitled to the rent thereof, the whole of such time shall be excluded in the computation of the several periods of time before mentioned (*s*).

15. And it is also provided, that the time during which any person otherwise capable of resisting any claim shall have been or shall be an infant, idiot, non compos mentis, feme covert, or lay tenant for life, or during which any action or suit shall have been pending,

(*q*) Dean and Chapter of Ely *v.* (*r*) Sec. 2.
 Cash, 15 Mees. & Wels. 617; (*s*) Sec. 5.
supra, sect. 3, pl. 3.

and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods before mentioned, except only in cases where the right or claim is thereby declared to be absolute and indefeasible (*t*).

16. And it is enacted (*u*) that in all actions and suits to be commenced after the act, it should be sufficient to allege that the modus or exemption or discharge claimed was actually exercised and enjoyed for such of the periods mentioned in the act as may be applicable to the case; and if the other party should intend to rely on any proviso, exception, incapacity, disability, contract, agreement, deed or writing therein mentioned, or any other matter of fact or of law not inconsistent with the simple fact of the exercise and enjoyment of the matter claimed, the same is to be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of the matter claimed.

17. And it is enacted that in the several cases mentioned in and provided for by the act, no presumption shall be allowed or made in favour or support of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in the act as may be applicable to the case and to the nature of the claim (*v*) (I).

(*t*) Sec. 6. (*u*) Sec. 7; see *Salkeld v. Johnston*, *ubi sup.* (*v*) Sec. 8.

(I) For the new limitation upon actions of debt for rent, or upon any bond, &c., see 3 & 4 Will, 4, c. 42, ss. 3, 4, 5, and 7, which last section,

18. The act did not prejudice any suit or action then commenced, or which might be commenced during that session of Parliament, or within one year from the end thereof. In consequence of this latter saving many suits were filed to establish the right to tithes where there was an alleged modus (x), and most of the doubtful cases have been set at rest by decree. The tithe commutation act contains due provision for the allowance or trial of moduses (y).

19. There is one other provision in the act, that it should not extend or be applicable to any case where the tithes of any lands, tenements, or hereditaments had been demised by any deed for any term of life or number of years, or where any composition for tithes had been made by deed or writing by the person or body corporate entitled to such tithes, with the owner or occupier of the land for any such term or number of years, and such demise or composition should be subsisting at the time of the passing of the act, and where any action or suit should be instituted for the recovery or enforcing the payment of tithes in kind, within three years next after the expiration, surrender, or other determination of such demise or composition (z).

(x) See 4 & 5 Will. 4, c. 83.

319; *Wetherell v. Weighell*, *id.*

Clar. Hall. (y) 6 & 7 Will. 4, c. 71, ss. 44,

245.

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45: upon this act, see *Wetherell v. Bellwood*, 3 You. & Coll.

(z) Sec. 4; see *Dean and Chapter of Ely v. Bliss*, 5 Beav. 574.

it should be remembered, applies generally to the 21 Jac. 1. As to the operation of this statute on rent, see *Paget v. Foley*, 2 Bing. N. C. 679; *Hodges v. C. C. Company*, 3 Beav. 86; and the cases *supra*, section 7, pl. 40—44. As to section 5, see *Kempe v. Gibbon*, 12 Adol. & Ell. N. S. 662.

SECTION IX.

OF RIGHTS OF COMMON, OF WAY, OF LIGHT, &c.

1. 2 & 3 Will. 4, c. 71, s. 1 : *rights of profits à prendre : thirty years : sixty years.*
2. Section 2. *Easements twenty years : forty years.*
3. Section 3. *Light twenty years.*
4. Section 4. *Computation of time : interruption.*
5. Section 5. *Mode of pleading.*
6. Section 6. *Restriction of presumption.*
7. Section 7. *Disabilities saved : tenancy for life, &c.*
8. Section 8. *Exclusion of time in computing the forty years.*
9. } *General view of the operation*
10. } *of the act.*
11. }
12. *Party must claim right to profits à prendre and easements : what amounts to such a claim.*
13. *Leave asked or agreement within the period, admission of no right.*
14. *Unity of seisin : unity of possession, time does not run.*
15. *Must be without interruption : what amounts to an interruption : the whole time must be covered.*
16. *Natural causes not an interruption.*
17. *Light must be enjoyed as an easement distinct from the enjoyment of the land.*
18. *Hartridge v. Warwick acc.*
19. *Other modes in which the thirty years for profits à prendre, or twenty years for easements, may be defeated.*
20. *Custom of London excluded as to light.*
21. *How time is to be reckoned : effect of interruption for less than a year.*
22. *Later years unaccounted for, fatal.*
23. *Cesser of user under agreement or new way : yet time runs.*
24. *Proof of enjoyment beyond the period.*
25. *Abandonment of right, irrespective of time.*
26. *Operation of disabilities : tenancy for life.*
27. *Saving for reversioner as to forty years' claim of easement.*
28. *Difficulties upon section 8 : convenient substituted for easement.*
29. *No bar, unless the rights of all are barred.*
30. *Pleadings : exclusion of presumption.*
31. *Section 5 must be literally followed.*
32. *Time must be stated according to section 4.*
33. *What must be specially replied to ; and what given in evidence under a general traverse.*

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| 34. <i>Tenancy for life should be specially replied.</i>
35. <i>Unity of possession or circumstances negativing user as of right may be proved under a traverse.</i> | 36. <i>Difficulties upon section 5 : light : rights in gross : disabilities.</i>
37. <i>What a purchaser should ascertain.</i> |
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1. THE provisions in regard to the limitation of the time of prescription in the cases which we are now to consider are contained in the 2 & 3 Will. 4, c. 71 (I). The statute recites that the expression, “time immemorial, or time whereof the memory of man runneth not to the contrary,” was then, by the law of England, in many cases considered to include and denote the whole period of time from the reign of Richard the First, whereby the title to matters that had been long enjoyed was sometimes defeated by showing the commencement of such enjoyment, which was in many cases productive of inconvenience and injustice; for the remedy thereof it was enacted, that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of the Crown, or of the Duchy of *Lancaster*, or of the Duchy of *Cornwall*, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are in the act specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right,

profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same was then liable to be defeated ; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

2. And no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of the Crown, or parcel of the Duchy of *Lancaster* or of the Duchy of *Cornwall*, or the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as therein last before-mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same was then liable to be defeated ; and where such way or other matter as therein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

3. And when the access and use of light to and for any dwelling house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

4. And each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and no act or other matter shall be deemed to be an interruption, within the meaning of the statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.

5. And it is enacted, that in all actions upon the case and other pleadings, wherein the party claiming might then by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in the act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of the act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tene-

ment in respect whereof the same is claimed for and during such of the periods mentioned in the act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as was then usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter thereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.

6. And in the several cases mentioned in and provided for by the act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in the act as may be applicable to the case and to the nature of the claim.

7. But it is provided that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods thereinbefore mentioned, except only in cases where the right or claim is thereby declared to be absolute and indefeasible.

8. And it is also provided, that when any land or

water upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived had been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as therein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall, within three years next after the end or sooner determination of such term, be resisted by any person entitled to any reversion expectant on the determination thereof.

9. Instead of stating and commenting on the sections of this act separately, I have found it necessary to state the whole act in the first instance, because its provisions are such as to render it impossible to understand the full operation of any clause without we have the other clauses before us at the same time, and in many cases the decisions on one section apply equally to others. The act treats of three subjects: profits *à prendre* by the 1st section; easements by the second; and the access and use of light by the 3d. It prevents the two first rights from being defeated after the prescribed enjoyment by merely showing that such right or benefit was first taken or enjoyed at any time prior to the period in question, but where the first time of limitation only has elapsed, viz. thirty years for profits *à prendre*, and twenty years for easements, the claim may be defeated in any *other* way by which the same was before liable to be defeated. But where in the case of profits *à prendre* there shall have been sixty years' enjoyment, the right is made absolute, and so it

is in the case of easements where there has been forty years' enjoyment; unless in either case there shall be some consent or agreement by deed or writing. Light is put on a more favourable footing, for twenty years' enjoyment creates an absolute right, unless there shall be some consent or agreement by deed or writing. All the periods appointed by the act are to be deemed periods next before any action or suit wherein the claim or matter may be called into question. But the periods appointed by the act are thus qualified: the disabilities and particular estate and litigation enumerated in the 7th section pending the duration of which time is to be excluded in the computation of the fixed periods extend to *all* the cases except only those where the right or claim is declared to be indefeasible, and those are the claims to profits *à prendre* protected by sixty years' enjoyment under the 1st section, and the claims to easement protected by the forty years' enjoyment under the 2d section, and the claims to light protected by twenty years' enjoyment under the 3d section. But in regard to easements where forty years' enjoyment would make the right indefeasible if the act had stopped there, it is provided that where the land or water over or from which the easement shall be enjoyed is held for life or for any term exceeding three years, the time during the continuance of such term is to be excluded in the computation of the forty years, if the claim shall within three years after the end of such term be resisted by the reversioner.

10. It is however required in the case both of profits *à prendre* under the 1st section, and of easements under the 2d section, that the enjoyments should be by some person claiming right thereto without in-

terruption, whilst in the case of light it ~~is~~ required that the enjoyment should be in like manner without interruption, but it is not required that the enjoyment should be by a person claiming right thereto.

11. In all the cases provided for by the three first sections, viz., profits *à prendre*, easements and light, time is not made a bar where it shall appear that the enjoyment was by some consent or agreement expressly made or given by deed or writing.

12. We may now proceed to the consideration of the leading cases on the statute. To give effect under the act to claims to profits *à prendre* and to easements, it is first required that the right claimed shall have been actually taken and enjoyed by some person claiming right thereto for the period specified. It has been observed that the words "as of right" cannot mean an adverse right; for the statute provides that if the enjoyment be under an agreement, the agreement must be pleaded specially, by which plea the allegation of enjoyment "as of right" would be met, not by way of denial, but by way of confession and avoidance (*a*). They mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time on each occasion, or even on many occasions of using it, but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use it, without danger of being treated as a trespasser, as a matter of right, whether strictly legal by prescription and adverse user, or by deed conferring the right, or though not strictly legal, yet lawful to the extent of excusing a trespass, as by a consent or agreement in writing not under seal, in

(a) 4 Adol. & Ell. 376; *per* Patteson, J., p. 379.

case of a plea for forty years, or by such writing or parol consent or agreement, contract or licence, in case of a plea of twenty years (*b*).

13. Where leave is asked from time to time *within* the forty or twenty years, for example, it breaks the continuity of the enjoyment as of right, because each asking of leave is an admission that at that time the asker had no right (*c*). It follows that not only an asking leave, but an agreement *commencing within the period*, proves that there was not at the time the agreement was made, an enjoyment as of right, and so the continuity is broken (*d*).

14. Unity of seisin may be without possession (*e*), but enjoyment in consequence of unity of possession, so that no person could complain of the enjoyment or user is not sufficient : it is inconsistent with the simple fact of enjoyment as of right (*f*) ; and the claimant in the case of a right of way, for example, would not have enjoyed as of right the easement but the soil itself (*g*). And unity of possession is equally operative in cases of profits *à prendre* depending on the 1st section (*h*).

15. The statute requires that the enjoyment should be without interruption for the given periods in all the cases provided for by the three first sections. This

(*b*) *Tickle v. Brown*, 4 Adol. & Ell. 382, *per Curiam* ; see *Bright v. Walker*, 1 Cro. Mees. & Ros. 211 ; 4 Tyrw. 502 ; *Arkwright v. Gell*, 5 Mees. & Wels. 233.

(*c*) *Monmouthshire Canal Company v. Harford*, 1 Cro. Mees. & Ros. 614 ; 5 Tyrw. 68.

(*d*) 4 Adol. & Ell. 383.

(*e*) *England v. Wall*, 10 Mees. & Wels. 699.

(*f*) *Onley v. Gardiner*, 4 Mees. & Wels. 496 ; *Clay v. Shackeray*, 2 Mood. & Rob. 244 ; 9 Car. & Pay. 47.

(*g*) *Bright v. Walker*, 1 Cro. Mees. & Ros. 211.

(*h*) *Clayton v. Corby*, 2 Adol. & Ell. N. S. 813.

necessarily imports such an user as could be interrupted by some one capable of resisting the claim (*i*). And the interruption mentioned in the act means an obstruction by the owner of the *locus in quo* (*k*): an obstruction by the act of some other person than the claimant, not a cessation by him of his own accord: the words are, “without interruption,” not “without intermission;” and therefore a cessation of user by his own accord admits of explanation. A commoner having ceased to use the common during two years of the thirty because he had no commonable cattle at the time, but having used it before and after, it was held that the jury were justified in finding a continued enjoyment during thirty years (*l*). But the proof must cover the thirty years, therefore a proof for twenty-eight years immediately before which the right was obstructed, although it was exercised before that obstruction, is not sufficient (*m*). If the claim had been made by virtue of immemorial usage or of a non-existing grant, as was done before the statute, twenty-eight years’ enjoyment would have been some evidence; but the late act, whilst it dispenses with the necessity of setting up such user or grant, and limits proof to a thirty years’ enjoyment, requires that that enjoyment shall be proved to the full extent (*n*). Section 4 requires each of the

(*i*) See *Arkwright v. Gell*, 5 Mees. & Wels. 233.

(*k*) 4 Mees. & Wels. 497; as to light, see *infra*, pl. 17.

(*l*) *Carr v. Foster*, 3 Adol. & Ell. N. S. 531.

(*m*) *Bailey v. Appleyard*, 3 Nev. & Per. 257; 3 Adol. & Ell. 161; see *Clay v. Thackrah*, 9 Car. & Pay. 47.

(*n*) 2 Adol. & Ell. 166, *per* Little-
dale, J., in *Bailey v. Appleyard*.
In that case it appears that there
was an exclusion, and not simply
an interruption, for the two years:
if it amounted to an interruption,
yet it had existed and been acqui-
esced in for more than a year. Note
prefixed to 3 Adol. & Ell., vide
infra, s. 4.

respective periods of years to be taken to be the period next before some suit or action wherein the claim shall have been or shall be brought into question: thus, as a learned Judge observed, making the thirty or other number of years before spoken of entire periods (*o*).

16. So obstruction or interruption from natural causes over which the party could have no control, will not operate to his prejudice, as in the case of water, or the accident of a dry season (*p*); but unity of possession, as we have seen, will prevent time from running (*q*).

17. In regard to light to or for any building, although twenty years' enjoyment of that gives a title without being clogged with the condition that the person enjoying it claimed right thereto, or being left open to be defeated in any other way than that pointed out by the statute, viz., by interruption, or by its appearing that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing (*r*), yet the enjoyment of the access of light to a house, over contiguous land, must have been held as an easement distinct from the enjoyment of the land itself, in order to entitle the claimant to the benefit of the statute.

18. This was decided, and the grounds of the decision fully explained in the case of *Hartridge v. Warwick* (*s*). A house and garden as far back as the

(*o*) 3 Adol. & Ell. N. S. 167.

(*p*) *Hall v. Swift*, 3 Bing. N. C. 381; see the remarks of Patteson, J., on that case, 3 Adol. & Ell. N. S. 585, 586; and see *Welcome v. Upton*, 6 Mees. & Wels. 536, as to an

interruption over part of the land over which there is a right of pasturage. *Davies v. Williams*, 15 Jur. 752

(*q*) *Supra*, pl. 14.

(*r*) Sec. 3.

(*s*) 3 Excheq. Rep. 552.

payment of rent for the use of lights is not an interruption of the enjoyment so as to defeat a prescription under s. 3. (*Plasterers Co. v. Parish Books Co.*, 15 Jur. 985) There must be a discontinuance of the enjoyment to constitute such an interruption. (S. C.)

memory of witnesses went were in the possession of the same person: the garden was held under a yearly tenancy, over which the access of light to the house took place, and the enjoyment of the light had been without interruption until a recent period, when the tenancy of the garden was changed, and a wall was built upon it which obstructed the light. It was not contended that from twenty years or longer enjoyment of light in this case, any grant of a right to it, that is, any covenant not to build on the adjoining soil to the injury of the light, could be presumed. It was not so at law, nor was it so by the 3d section of this statute. This section, it was observed, was no doubt differently worded from the others, and the acquisition of right to light was much favoured, as a far less time gives an indefeasible right; and if there be an actual enjoyment for twenty years, such as this 3d section contemplates, a right is gained though the owner of the adjoining property be the occupier, and be for the whole period under disability to grant. It also differs from the 2d section in not requiring that the enjoyment should be by a person "claiming right" in express terms. But notwithstanding the absence of these words in the 2d section, the 3d section, it was held, converts into a right such an enjoyment only of the access of light over contiguous land as has been had for the whole twenty years *in the character of an easement*, distinct from the enjoyment of the land itself, and the statute puts this species of negative easement on the same footing in this respect as those positive easements provided for by the other sections, all of which after long enjoyment *as* easements are invested with the quality of rights. The access of light under

this section must have been enjoyed for twenty years, *without interruption*, not in the sense of an uninterrupted or continuous user, but without such interruption as is mentioned in the subsequent section, that is, an interruption submitted to for one year after the party interrupted shall have had notice thereof, and of the persons making or authorizing the same to be made. This point was determined in *Flight v. Thomas*, 11 Adol. & Ell. and 8 Cla. & Fin. From this it follows that the legislature contemplated such an enjoyment as could be interrupted by the adjoining occupier, at least during some part of the time. The forms of pleading in section 5 *might* be applicable to such a case, and under that the right must have been immemorially enjoyed, or the enjoyment of the light must have been *as of right* by the occupier of the tenement in respect whereof it is claimed for twenty years. The enjoyment of the light connected with the occupation of the land itself for twenty years would not support that allegation. This construction puts all the claims provided for by the act on a similar footing, and dispenses with the giving of some evidence of immemorial usage, or of relying on the fiction of a lost grant. This clear explanation of the operation of the 3d section was given by Parke, Baron, in delivering the judgment of the Court in *Hartridge v. Warwick*. And it was also decided that the plaintiff could not maintain that the lights were immemorially enjoyed, or had been granted prior to the beginning of the sixty years, for as far back as the memory of witnesses went the house and garden were in the possession of the same person; and if no grant could be presumed from the enjoyment of the lights in that condition of the property, none could

be presumed before, for there was no evidence to show that they were ever occupied otherwise.

19. But although the statute prevents the claim from being defeated by showing only that the right, way, or other matter was first enjoyed at any time prior to the period limited by the act, yet upon the thirty years' bar in the case of profits *à prendre*, and upon the twenty years' bar in the case of easements, the claim may be defeated in any other way by which the same when the act passed was liable to be defeated; that is, (*t*) by the same means by which a similar claim by custom, prescription, or grant, would be defeasible, and therefore it may be answered by proof of a grant or licence, written or parol, for a limited period, comprising the whole or part, for example, of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised.

20. The 3d section, as to light, excludes by its general provision the custom of London (*u*).

v. Swannell
42, 15th Jan. 675
21. The act, as we have seen, limits the time which in the several cases is to create a bar, and all the periods are to be taken next before the suit or action: and this has been literally followed, so that time cannot be reckoned with reference to the trespass complained of, but depends on the period when the action or suit was brought in which the claim was brought into question (*x*). But no interruption is to operate unless

(*t*) *Bright v. Walker*, 1 Cro. Mees. & Ros. 211; *per Parke*, B.

(*u*) *Salters' Company v. Jay*, 3 Adol. & Ell. N. S. 109.

(*x*) *Wright v. Williams*, 1 Mees.

& Wels. 77; *Jones v. Price*, 3 Bing. N. C. 52; *Lawson v. Langley*, 4 Adol. & Ell. 390; *Richards v. Fry*, 7 Adol. & Ell. 698; *Flight v. Thomas*, 8 Cla. & Fin. 242.

acquiesced in for a year (*y*). An interruption in the last year of the twenty years, for example, is the same as an interruption of the same duration in the middle of the twenty years. Therefore an enjoyment for nineteen years, and a portion of another year, will establish the right to light, for example, provided the action be brought before the interruption has continued for the full period of a year (*z*).

22. But user for the proper number of years before the commencement of the action is unavailing, if the last four or five years are unaccounted for: there is no case to be left to the jury (*a*).

23. The twenty years' user under section 2 may be made out, although there was a cessation of enjoyment during those years, under a temporary agreement, or a new way was enjoyed by way of substitution, under a parol agreement, during part of the period; for the user of the new line may be considered as substantially an exercise of the old right: for if I have a right over another's land, and he for a time gives me a consideration for ceasing to exercise it, I enjoy the right while receiving the compensation (*b*).

24. A claim depending upon an enjoyment for forty years may be supported by evidence of enjoyment beyond that period; for if evidence of user beyond forty years were to be excluded, it might be that after

(*y*) Sec. 4; *Wright v. Williams*, 1 Mees. & Wels. 77; *Richards v. Fry*, 7 Adol. & Ell. 698.

(*z*) *Flight v. Thomas*, 11 Adol. & Ell. 688; in the marginal note the nineteen years are accidentally omitted; 8 Cl. & Fin. 231; *Parker v. Mitchell*, 11 Adol. & Ell.

788; *Wright v. Williams*, 1 Mees. & Wels. 77.

(*a*) *Parker v. Mitchell*, 11 Adol. & Ell. 788.

(*b*) *Payne v. Shedden*, 1 Mood. & Rob. 382; 3 Adol. & Ell. N. S. 585.

the case had been established as far as thirty-eight years back, a discontinuance of proof might occur as to the two or three preceding years, and the party might fail because he was unable to carry his case on without going to the distance of forty-one (*c*).

25. Although twenty years' user in the absence of an express grant would be necessary for the acquisition of a right of way, yet twenty years' cesser of the use, in the absence of an express release, is not necessary for its loss, for the cesser of use, coupled with an act clearly indicative of an intention to abandon the right, would destroy it without any reference to time (*d*).

26. The savings for the usual disabilities (which, however, do not include imprisonment or absence beyond the seas), as we have seen, do not apply to cases where the right or claim is by the act declared to be indefeasible; but the act expressly adds, as matters which will prevent time from running: 1. Where the person capable of resisting any claim is tenant for life; 2. The pendency of an action or suit which shall have been diligently prosecuted until abated by the death of any party thereto (*e*) (1). During the period of a tenancy for life, the exercise of an easement will not affect the fee; in order to do that there must be the proper period of enjoyment *against* an owner of the fee (*f*). Upon a claim under the 1st section,

(*c*) *Lawson v. Langley*, 4 Adol. & Ell. 890.

(*e*) Sec. 7.

(*f*) *Bright v. Walker*, 1 Cro.

(*d*) *The Queen v. Chorley*, 12 Adol. & Ell. N. S. 515. Mees. & Ros. 222, *per Curiam*.

(1) This does not repeal, but must be reconciled with the enactment in sect. 4, that the periods limited are to be taken to be those next before some suit or action wherein the claim or matter to which such period may relate shall be brought in question.

founded on thirty years' enjoyment (*g*), it was urged that if there was a tenancy for life during any part of the thirty years, the time of that tenancy was to be excluded, and the thirty years could not be computed at all; but it was held that the 4th and 7th sections are to be read together, so that the period is to be thirty years before the action, excluding in the computation of these thirty years any tenancy for life, that is, thirty years' enjoyment, either wholly before the tenancy for life, if it be still subsisting, or partly before and partly after, if it be ended.

27. The last provision in the act, viz. section 8, does not, as we have seen, relate to light. As to the easements within it, it excludes from the computation of the *forty years* the time the land or water shall be held for life, or any term of years exceeding three years from the granting thereof, but only in case the claim shall within three years after the end of such term be resisted by the reversioner (*h*); thus giving the reversioner of the land or water a reasonable time to resist the claim of the easement, after the subject over which it is claimed falls into possession where an indefeasible title is claimed from forty years' enjoyment.

28. The reader will have observed that the expression in the 8th section of the statute is "when any land or water, upon, over, or from which any such way or other *convenient* watercourse or use of water" shall have been enjoyed, &c., the time of the enjoyment of "any such way or other matter as herein last before mentioned," &c. It is manifest that by a clerical error

(*g*) *Clayton v. Corby*, 2 Adol. & Ell. N. S. 813; *Pye v. Mumford*, 11 Adol. & Ell. N. S. 666.

(*h*) 4 Mees. & Wels. 500.

the word "convenient" has been substituted for "easement" (*i*); but the word thus introduced has no connexion with the clause; and as with reference to the preceding clauses the meaning is obvious, the courts, it should seem, may well read the section with the word easement notwithstanding the words which follow in the section, for this is not a case in which operation is to be denied to a word in an act of Parliament, but the mere rejection of a word to which no sense can be given in the place where it is found, and the substitution from the context of the word clearly intended, in the precise place where it was introduced in a preceding clause to which this section has an immediate reference.

29. The statute nowhere contains any intimation that there may be different classes of rights, qualified and absolute,—valid as to some persons, and invalid as to others. From hence it has been concluded that an enjoyment of twenty years, if it give not a good title against all, gives no good title at all; and it was accordingly held that as an adverse user of right for twenty years or forty years against a bishop's lessee for life might be disputed by the bishop within three years after the expiration of the lease, it gave no title against the bishop, and consequently not binding all it bound no one; not even the lessee against whom the right had been adversely enjoyed (*k*). This, it must be admitted, is a question of great nicety.

30. It remains to consider shortly the provisions as to pleading and the restrictions of presumptions. As to the latter, section 6 excludes any presumption from

(*i*) 1 Mees. & Wels. 77.

(*k*) *Bright v. Walker*, 1 Cro. Mees. & Ros. 211.

proof of the exercise of right during a less period than the previous clauses require. Formerly an immemorial enjoyment was presumed from proof going back to the extent of living memory, now, by section 6, that is no longer permitted, but no difference is made as to the proof of intermediate user (*l*).

31. The words in the 5th section as to the allegation in pleadings of the enjoyment *as of right* have the same meaning as the words *claiming right* in the 1st and 2d sections, which we have already considered. If parties choose to adopt this form, which is optional, they must follow the very words (*m*).

32. In pleading, the time of enjoyment must be stated with reference to the directions in the 4th section; but although that section speaks of the period *next* before the action or suit, the word *next* may be omitted in the pleadings (*n*), as it does not alter the sense (*o*).

33. A licence in writing, if it cover the whole time, must be replied to a plea of forty years' enjoyment, and the same of a parol licence; in case of a plea for twenty years, a parol licence may be replied to a plea of a twenty years' enjoyment, though not to an allegation of forty years' enjoyment (*p*); but an asking leave, or an agreement *commencing within the period*, may be given in evidence under the general traverse, notwithstanding the words of the 5th section, for the continuity is

(*l*) 3 Adol. & Ell. N. S. 588, *per* Patteson, J.; *Bailey v. Appleyard*, 3 Nev. & Per. 260; 3 Adol. & Ell. 161.

(*m*) *Tickle v. Brown*, 4 Adol. & Ell. 369; *Holford v. Hankinson*, 5 Adol. & Ell. N. S. 584.

(*n*) *Jones v. Price*, 3 Bing. N. C. 52; for the usual mode of pleading, see *Lord Stamford v. Dunbar*, 13 Mees. & Wels. 827.

(*o*) 7 Adol. & Ell. 707.

(*p*) 4 Adol. & Ell. 375.

broken, which is inconsistent with the simple fact of enjoyment during the forty or twenty years (*q*). It was plain, the Court observed, that the legislature treated the matters required to be specially pleaded as consistent "with the simple fact of enjoyment;" and the words, *as of right*, cannot be confined to an adverse right, as far as evidence shows; for if so confined, such enjoyment, once confessed, could not be avoided by replying that it was held by contract, which is not adverse. So *enjoyment as of right* cannot be confined to a strict legal right; for a consent in writing, not under seal, of which the 2d section speaks, could not account for such enjoyment. It seemed, therefore, to the Court, that the words *enjoyment of the right*—which must have the same sense as the words *claiming right thereto*, in the 2d section—must mean an enjoyment had openly, without particular leave at the time, by a person claiming to use it without danger of being treated as a trespasser; as a matter of right, whether strictly legal by prescription and adverse user, or by deed conferring the right, or though not strictly legal, yet lawful, to the extent of excusing a trespass, as by a consent or agreement, contract or licence, in case of a plea for twenty years (*r*). And in another case the Court of Common Pleas observed that the words of the 5th section, *not inconsistent with the simple fact of enjoyment*, were referable, as they understood the statute, to the fact of enjoyment, as before stated in

(*q*) *Tickle v. Brown*, 4 Adol. & Ell. 369; *Beasley v. Clarke*, 2 Bing. N. C. 705, which is said to be a strong case; 11 Adol. & Ell. N. S. 673; *Clay v. Shackeray*, 2 Mood. & Rob. 244; *Kinloch v. Nevile*, 6 Mees. & Wels. 795; *Holford v.*

Hankinson, 5 Adol. & Ell. N. S. 584.

(*r*) 4 Adol. & Ell. 583, *per* Lord Denman; *Monmouthshire Canal Company v. Harford*, 1 Cro. Mees. & Rose. 614; 2 Bing. N. C. 709; 4 Mees. & Wels. 501, *supra*, pl. 12.

the act, viz. an enjoyment claimed and exercised *as of right* (*s*).

34. Where the defendant pleaded the enjoyment of a right on the land for thirty years under section 1, and the plaintiff by his replication traversed the enjoyment, it was held that a tenancy for life could not be received in evidence on that traverse, but ought to have been specially replied (*t*).

35. Unity of possession may be proved under a traverse of the right (*u*), and so may any other circumstances which negative that the user or enjoyment is one under a claim of right (*x*).

36. It has been said to be questionable whether the forms given in section 5 apply to windows (*y*). And that section says that it shall be sufficient to allege the enjoyment *by the occupiers of the tenement in respect whereof the same is claimed*, which seems to exclude rights in gross, but they have been thought to be within the equity of the statute (*z*); and this is not a violent construction. A further difficulty has been raised on this section, in consequence of the expressions in it, "that if the other party shall rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned," &c., inasmuch as the disabilities in sections 7 & 8 follow, and do not precede this section. One learned Judge said that the legislature probably

(*s*) 2 Bing. N. C. 709.

(*t*) *Pye v. Mumford*, 11 Adol. & Ell. N. S. 666.

(*u*) *England v. Wall*, 10 Mees. & Wels. 699; see *Pye v. Mumford*, 11 Adol. & Ell. N. S. 666.

(*x*) *Beaseley v. Clarke*, 2 Bing. N. C. 709, *supra*; *Clay v. Shack-*

eray, 2 Mood. & Rob. 244; 9 Car. & Pay. 47.

(*y*) 11 Adol. & Ell. 695; see *Hartridge v. Warwick*, 3 Excheq. Rep. 552, *supra*, pl. 18.

(*z*) *Welcome v. Upton*, 6 Mees. & Wels. 542; *Wickham v. Hawker*, 7 Mees. & Wels. 63, 81.

meant only "herein," and another suggested that the inference from the occurrence of the words *incapacity* and *disability* might perhaps be, that the words "hereinbefore mentioned" were to be confined to other matter (*a*). This, taking the whole of the clause into consideration, does not seem to be an objection of much weight, and of course it does not apply to the subsequent words "or any cause or matter of fact or law not inconsistent with the fact of enjoyment" (*b*).

37. It has been observed, that as far as these provisions bear upon title, a purchaser of course should see that the enjoyment of the easement has been not only for the term required by the act, but that the savings or exclusions of time prescribed by the act have not prevented the right from becoming absolute, and a purchaser would therefore have to be satisfied of the nature of the estates of the owners of the land or water over or from which the rights have been enjoyed; and it should be borne in mind that every one of the rights may be defeated by showing that it was enjoyed by agreement in writing, and that the limited bars of thirty years and twenty years are open to impeachment in any other way by which such a claim can be defeated at law than the showing that it was first enjoyed prior to such thirty years or twenty years (*c*).

(*a*) 11 Adol. & Ell. N. S. 668, 670.

(*b*) *Pye v. Mumford*, 11 Adol. & Ell. N. S. 666.

(*c*) Sugd. Concise View, 371.

CHAPTER II.

OF TITLE UNDER TENANT IN TAIL: 3 & 4 WILL. 4, c. 74.

SECTION I.

OF DEFECTS IN RECOVERIES; OF EXISTING AGREEMENTS; AND
WHAT THE ACT ABOLISHES,

- | | |
|---|---|
| <ol style="list-style-type: none"> 1. <i>Ancient demesne.</i> 2. <i>Court without jurisdiction.</i> 3. <i>Errors apparent from deed amended in fines.</i> 4. <i>So in recoveries.</i> 5. <i>How acted upon.</i> 6. <i>Recoveries defective rendered</i> 7. <i>valid,</i> | <ol style="list-style-type: none"> 8. <i>Fines and recoveries abolished.</i> 9. <i>Warranties by tenant in tail void against issue, &c.</i> 10. <i>Statute as to estates tail ex prov. viri repealed.</i> 11. <i>Existing agreements to be performed by deed.</i> |
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THE whole law as to barring estates tail is by a late statute (a) altered (I), and a new mode of unfettering

(a) 3 & 4 Will. 4, c. 74 (August 23, 1833).

(I) This act does not operate by relation on the 1 Will. 4, c. 65; see *ex parte* Clayton, 3 Myl. & Kee. 247. The 1st section declares that in the construction of the act the words "lands" shall extend to manors, advowsons, rectories, messuages, lands, tenements, tithes, rents, and hereditaments of any tenure (except copy of court roll), and whether corporeal or incorporeal, and any undivided share thereof, but when accompanied by some expression including or denoting the tenure by copy of court roll, shall extend to manors, messuages, lands, tenements, and hereditaments of that tenure, and any undivided share thereof; and the word "estate" shall extend to an estate in equity as well as at law, and shall also extend to any interest, charge, lien, or

estates in settlement is introduced. We may divide the leading subjects of the act as follows: 1. Where

incumbrance in, upon, or affecting lands, either at law or in equity, and shall also extend to any interest, charge, lien, or incumbrance in, upon, or affecting money subject to be invested in the purchase of lands; and the expression "base fee" shall mean exclusively that estate in fee simple into which an estate tail is converted where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred; and the expression "estate tail," in addition to its usual meaning, shall mean a base fee into which an estate tail shall have been converted; and the expression "actual tenant in tail" shall mean exclusively the tenant of an estate tail which shall not have been barred, and such tenant shall be deemed an actual tenant in tail, although the estate tail may have been divested or turned to a right; and the expression "tenant in tail" shall mean not only an actual tenant in tail, but also a person who, where an estate tail shall have been barred and converted into a base fee, would have been tenant of such estate tail if the same had not been barred; and the expression "tenant in tail entitled to a base fee" shall mean a person entitled to a base fee, or to the ultimate beneficial interest in a base fee, and who, if the base fee had not been created, would have been actual tenant in tail; and the expression "money subject to be invested in the purchase of lands" shall include money, whether raised or to be raised, and whether the amount thereof be or be not ascertained, and shall extend to stocks and funds, and real and other securities, the produce of which is directed to be invested in the purchase of lands, and the lands to be purchased with such money or produce shall extend to lands held by copy of court roll, and also to lands of any tenure, in Ireland or elsewhere out of England, where such lands or any of them are within the scope or meaning of the trust or power directing or authorizing the purchase; and the word "person" shall extend to a body politic, corporate, or collegiate, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the plural number shall extend and be applied to one person or thing as well as several persons or things; and every word importing the masculine gender only shall extend and be applied to a female as well as a male; and every assurance already made or hereafter to be made, whether by deed, will, private act of Parliament, or otherwise, by which lands are or shall be entailed, or agreed or directed to be entailed, shall be deemed a settlement; and every appointment made in exercise of any power contained in any settlement, or of any other power arising out of the power contained in any settlement, shall be considered as part of such settlement, and the

defects in existing recoveries are remedied ; 2. What the act abolishes ; 3. How existing agreements are to be performed ; 4. The power of tenant in tail ; 5. The effect of his partial dispositions ; 6. Who shall be protector ; 7. His office and power ; 8. Where a base fee shall be enlarged without a deed ; 9. What deeds are to be executed by tenants in tail and by protectors ; 10. Of copyholds ; 11. Of bankrupts ; 12. Of money ; 13. Of dispositions by married women ; and lastly, of the enrolment and acknowledgment of deeds, and of confirming a purchaser's voidable estate.

1. Fines and recoveries of lands in ancient demesne, levied or suffered in superior courts, are rendered valid as between the conusors and the vouchees, and all persons claiming under them, although they may still be reversed as to the lord (*b*). And although there shall have been no previous reversal of fines or recoveries of ancient demesne levied or suffered in the superior courts, yet fines or recoveries levied or suffered in the manor courts are made operative notwithstanding the change of tenure by the former fines or recoveries (*c*). These provisions remove the difficulties which constantly arose upon titles to lands in ancient demesne ; and writs of deceit are abolished, and the tenure of ancient demesne restored, where the right of the lord had been

(*b*) Sec. 4.

(*c*) Sec. 5.

estate created by such appointment shall be considered as having been created by such settlement ; and where any such settlement is or shall be made by will, the time of the death of the testator shall be considered the time when such settlement was made : provided always, that those words and expressions occurring in this clause, to which more than one meaning is to be attached, shall not have the different meanings given to them by this clause in those cases in which there is anything in the subject or context repugnant to such construction.

acknowledged within twenty years, notwithstanding unreversed fines or recoveries in the superior courts (*d*).

2. And fines and recoveries are made valid although levied or suffered in a court within whose jurisdiction the lands do not lie, or in a court unlawful or held without due authority, where persons shall have assumed to hold courts in which fines or recoveries have been levied or suffered (*e*).

3. And errors apparent from the deed declaring the uses of any fine in any indentures, record, or any of the proceedings of such fine, in the name of the conusor or conusee, or any misdescription or omission of lands intended to have been passed by such fine, are cured by the act itself (*f*).

4. So in like manner errors apparent from the deed making the tenant to the *præcipe* in a recovery, in the exemplification, record, or any of the proceedings of such recovery, in the name of the tenant, demandant, or vouchee, in such recovery, or any description or omission of lands intended to have been passed by such recovery, are cured by the act itself (*g*).

5. And the Court of Common Pleas will not, to satisfy the scruples of a purchaser, amend a fine or recovery which the act has declared valid without amendment (*h*), nor indeed does it seem that the Court has now jurisdiction in such cases.

6. Recoveries, whether suffered before or after the act, are rendered valid, although the bargain and sale to make the tenant to the *præcipe* was not enrolled in

(*d*) Sec. 6.

(*e*) Sec. 5 ; s. 12, *post*.

(*f*) Sec. 7.

(*h*) Lockington's case, 1 Bing.

(*g*) Sec. 8 ; see *post*, s. 12 ; and see s. 9, saving the jurisdiction in cases not provided for.

N. C. 355 ; see Totton's case, 5 Bing. N. C. 626, where the omission appears only by affidavit.

due time (*i*), and no recovery (*k*) is to be invalid in consequence of any person having a *legal* estate not having joined in making the tenant to the *præcipe*, provided the tenant shall have been made by a person who had an estate in possession not less than for a life, in the rents or surplus after payment of charges thereon, and whether there be any actual surplus or not ; and an estate is to be deemed to be in possession notwithstanding any prior leases for lives or years at a rent, or any term of years without rent. But this is properly confined by certain exceptions in the act, for it does not extend to fines or recoveries so far as they had been reversed ; nor where any person who would have been barred by any fine or recovery, if valid, has had *any dealings* with the estate on the faith of the same being invalid ; nor where the property, at the time of passing the act, was in possession of any person in respect of any estate which the fine or recovery, if valid, would have barred ; nor does it extend to any fine or recovery which, before the passing of the act, any court of competent jurisdiction had refused to amend, nor are pending proceedings for impeaching any fine or recovery affected, but a special provision is made for such cases (*l*) (I).

7. Subject to these savings, without which titles would have been more endangered than supported by the act, all recoveries are now valid, although there was only an equitable tenant to the *præcipe*, and the estate

(*i*) Sec. 10. (*k*) Sec. 11. (*l*) Sec. 12.

(I) Section 13 provides for the deposit of the records of fines and recoveries ; see 5 & 6 Will. 4, c. 82. As to defects in fines and recoveries of the late courts of great sessions in Wales, &c., and the enrolment thereof, see 5 & 6 Vict. c. 32.

tail was a legal one. These are excellent provisions, and they have operated favourably upon titles.

8. Fines and recoveries of lands of any tenure are altogether abolished after the 31st of December 1833 (I), except where parties intending to levy a fine or suffer a recovery, had, on or before that day, sued out a *dedimus* or any other writ in the regular proceedings of such fine or recovery (*m*).

9. And all warranties, after the 31st December 1833, by tenant in tail are made void against the issue in tail, and all persons in remainder, or who take in defeasance of the estate tail (*n*).

10. And in regard to future settlements the statute 11 H. 7, c. 20, as to estates tail *ex provisione viri*, is repealed (*o*).

11. Where under an agreement entered into before the 1st January 1834, any person is liable to levy a fine or suffer a recovery, or to procure some other person to do so, the engagement is to be performed in the mode substituted by the act for fines and recoveries, as far as it applies, and beyond that, a deed declaring the object is made operative (*p*).

(*m*) Sec. 2. (*n*) Sec. 14. (*o*) Sec. 17. (*p*) Sec. 3.

(I) And fines already levied have the force of fines with proclamations, with an exception. So that proclamations in general cases do not require to be proved, 11 & 12 Vict. c. 70.

SECTION II.

OF THE POWER OF TENANT IN TAIL.

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| <ol style="list-style-type: none"> 1. <i>He can acquire the fee simple.</i> 2. <i>Against whom.</i> 3. <i>Estates tail in contingency or divested.</i> 4. <i>Persons taking in defeasance of the estate tail.</i> 6. <i>Roper v. Halifax.</i> 7. } <i>Powers.</i> 8. } 9. } <i>Lord Scarborough's case.</i> 10. } 11. <i>Prior estate, to pass, must be conveyed.</i> 12. <i>Any disposition effectual.</i> 13. <i>Contracts : charges, &c.</i> | <ol style="list-style-type: none"> 14. <i>Contracts may be enforced, but not to bind the entail under the act.</i> 15. <i>Estates tail ex provisione viri.</i> 16. <i>Confirmation of voidable estate.</i> 18. <i>Base fee may be enlarged.</i> 19. <i>Mortgage or other limited purpose : limited estate charge or incumbrance operate variously.</i> 20. <i>Explanation.</i> 21. <i>Union of base fee and remainder in the same person, the former enlarged.</i> |
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1. AFTER the 31st December 1833, every actual tenant in tail, that is, the tenant of an estate tail which shall not have been barred, and such tenant will be deemed an actual tenant in tail, although the estate tail may have been divested or turned to a right (*a*), whether in possession, remainder, contingency, or otherwise, has power to dispose of for an estate in fee-simple absolute, or for any less estate, the lands entailed, saving the rights of persons in respect of estates prior to the estate tail (*b*).

2. The disposition is made good against all persons claiming by force of any estate tail vested in, or which might be claimed by, or which, but for some previous

(*a*) See s. 1.

(*b*) Sec. 15.

act, would have been vested in or might have been claimed by the person making the disposition, *at the time of his making the same*; and also against all persons, including the Crown, whose estates are to take effect after the determination, or in defeasance of any such estate tail, saving the rights of persons in respect of estates prior to the estate tail, and the rights of all other persons except those against whom such disposition is by the act authorized to be made (*c*). This provision has been held to extend to an estate tail granted by Charles the Second to one of his illegitimate children, for love and affection (*d*).

3. This provision enlarges the power of disposition by a tenant in tail, for a tenant in tail whose estate was divested, or a tenant in tail in contingency, could not have suffered a recovery: the former could not have made a tenant to the *præcipe*, and the latter could not by coming in upon the voucher have barred the remainders; but now, by the express terms of the act, a tenant in tail in contingency is authorized to bar the estate tail and remainders over. The operation of such a disposition depends wholly upon the statute: it seems clear that the fee obtained by the disposition will be subject to the like contingency as the estate tail was liable to, and it is apprehended that any vested remainder will not be affected unless and until the contingency happen, when the bar will become complete. The only effect of the disposition until the contingency happen, ought to be, to substitute a contingent fee for a contingent estate tail. There is no ground in law why a vested remainder in fee should be

(*c*) See. 15.

(*d*) *Duke of Grafton v. London and Birmingham Railway Company*, 5 Bing. N. C. 27.

disturbed before that period, because although a contingent remainder in fee prevents the creation of a vested remainder after it, yet there is less reason why by the operation of the statute, subsequent to the valid *creation* of a contingent estate tail with a vested remainder over, the vested remainder should not subsist with the contingent remainder in fee under the statute, than there was or is that a vested (base) fee and a remainder in fee are allowed a valid coexistence by the subsequent conversion of the estate tail into a base fee, although those two estates could not have been, and still cannot be, *created* in the same estate (*e*). The case of a tenant in tail in contingency should have been separately provided for. It is expressly within the act, but its operation is left to the one general clause, that his alienation shall be valid against persons claiming the estate tail, and also against all persons whose estates are to take effect after the determination of, or in defeasance of such estate tail. Where the person is uncertain, the entail cannot be barred. Where the person is certain, but the contingency depends upon the happening of a certain event, there is no objection to the tenant in tail barring the contingent remainder, and all remainders altogether depending upon it. If there are alternate contingencies, of course a bar by the tenant in tail under one contingency would not affect the estates to arise upon the other contingency, if the event happened upon which they depended. But if an estate were limited to *A* for life, remainder to *B* in tail upon a contingency, with remainders over not depending upon the contingency, but vested, would those remainders be affected

(*e*) See 1 Hayes' Conv. 5th edit., 197, n.

by *B*'s bar of his estate tail under the statute? They are, no doubt, to take effect after the determination of the contingent remainder in tail if that take effect, but they are also to operate although that remainder never does arise: to allow the contingent remainder-man in tail to bar the vested remainders over, would be to strike the contingency out of the original settlement, which was not the intention of the act; and although therefore, in the words of the act, the tenant in tail in contingency has power given to him to dispose of the estate for an estate in fee-simple absolute, yet this must, upon the context, be understood to mean a fee-simple like the estate tail, subject to the will of the donor, and therefore still subject to the original contingency, although if, and when the event happen, the fee acquired under the statute will become vested.

4. The disposition is made a bar to all persons whose estates are to take effect after the determination, *or in defeasance of the estate tail*, saving estates *prior* to the estate tail. This will no doubt be construed to mean the same operation which the old law gave to a common recovery, although it is difficult to accurately define the operation; nor do these words afford an accurate definition, for there are many estates which take effect in defeasance of the estate tail, which a disposition under the statute will not bar, but then they will be treated, as they in strictness are, as estates prior to the estate tail. However, all estates which, properly speaking, do take effect in defeasance of the estate tail, will be barred by a statute deed, therefore an executory or shifting limitation over after an estate tail, to take effect in defeasance of, and not

to await the regular determination of the estate tail, will be barred.

5. It was observed by the Court, in giving judgment in *Doe v. Lord Scarborough*, that this section (15) is expressed in general terms, and proves only, what in reality is not disputed as a general proposition, viz. that a recovery will not affect estates prior to the estate tail of which it is suffered (*f*).

6. In the case of *Roper v. Halifax* (*g*) there was a settlement with a power of sale in the trustees, with the consent of the tenant for life; a recovery was suffered, in which the tenant in tail only was vouched, which was to enure to confirm the estates previous to the estate tail, and the powers annexed to them, and subject thereto to the joint appointment of the father tenant for life and son tenant in tail under the settlement. The deed making the tenant to the *præcipe* contained the 100,000*l.* clause, as it is called, and the estate was vested in the tenant to the *præcipe* for the joint lives of him and the tenant for life only. The father and son made a joint appointment (subject to the aforesaid estates and powers) to new uses; and the trustees and the father and son conveyed (subject as aforesaid) to new uses, recapitulating the old ones previously to the estate tail, and new powers of sale, &c. were given. It was held, that the power of sale under the original settlement was not destroyed by the recovery or by the new settlement, and yet, in the words of this statute, the estate created by it would take effect in defeasance of the estate tail; but it was considered in law as creating an estate having priority

(*f*) 3 Adol. & Ell. 43. (*g*) MS. 8 Taunt. 845; 1 Sugd. Pow. 78.

over the estate tail, and this law clearly is not altered by the statute.

7. The Court observed, in the case of *Roper v. Halifax*, that this was a naked power in the trustees, to be exercised with the consent of the husband and wife, or the survivor. It was said by the defendant that this power was destroyed by the recovery. This proposition, so contrary to justice and to the intent of the settlors, it was incumbent on those who contended for it to establish by principle or authority, and they had done neither. This was a power antecedent to the estate tail, which, if ever it were exercised, must act on the land antecedent to the estate tail, and before the estate tail can take place. This power remains undisturbed by the recovery.

8. Where a power really is antecedent to an estate tail, as a power to *A* to appoint, and in default of, or until appointment to *B* in tail, no doubt *B*'s recovery will not bar the power any more than it would an actual preceding estate, and if, by the intention, the power is to take precedence of the estate tail, it is immaterial that the estate tail is *first* limited, and the power follows it. The true ground of the decision in *Roper v. Halifax* was, that as the power was to be exercised during the lives of the tenants for life, or the survivor, and not after, it was to be construed as if, being annexed to the life estates, it had been originally made to override the estate tail, in which case the estate tail would have been limited, after the life estates and the power, in default of, and until the execution of the power. The difficulties in the case were not grappled with by the Court. In the common case of a strict settlement with an unlimited power of sale

and exchange in trustees, it is not doubted that a recovery by the tenant in tail, after the death of the tenant for life, would bar the power.

9. The decision in *Roper v. Halifax* very much embarrassed the courts in the great case of the Earl of Scarborough. That turned upon a shifting clause in case of accession to the title. The Court of King's Bench considered a recovery suffered by the tenant for life and tenant in tail, as having barred all the *remainders* over; but they held, that the clause did not operate merely to defeat the particular estates and accelerate the remainders, but created *new* estates, which overrode the estate tail, and were therefore not affected by the recovery. In the Exchequer Chamber this decision was reversed, upon the ground that the recovery destroyed all the old remainders, and the proviso created no new ones (*h*). The Court observed, that considerable reliance was placed, by the party claiming against the recovery, on the case of *Roper v. Halifax*. That case might, however, be admitted to have been rightly decided, without weakening the ground upon which their judgment rested; for it might well be held, that the recovery suffered in that case by the tenant for life and the remainder-man in tail should not extinguish a power which was attached to the estate of the trustees for preserving contingent remainders during the estate of the tenant for life, nor bar the *new estates* created by the exercise of that power; and yet, at the same time, the recovery suffered in the present case by the tenant for life in possession and the next remainder-man in tail might be sufficient to bar the *old estates* expectant on such estate tail,

(*h*) Lord Scarborough *v. Doe d. Savile*, 3 Adol. & Ell. 897.

which continued unaltered by the proviso, except as to the time of enjoyment.

10. In most cases the object of a power is to introduce new estates ; but still that circumstance alone will not preserve the power from being barred by a recovery. It is, perhaps, to be regretted that the question was not more fully considered, whether, assuming that the proviso in Lord Scarborough's case did create new estates, the prior recovery by the tenant for life and next vested remainder-man in tail, did not bar the proviso, and consequently the new estates, which, but for the recovery, would have been created by it.

11. It will be observed, now that the owner of the prior estate may consent to the disposition by the tenant in tail, without conveying his own estate, that no question will in future arise in regard to the operation of the conveyance by the tenant for life upon the powers given to him by the settlement. But where the prior estate is intended to be transferred, it must be so in the usual manner, although not necessarily by the statute deed.

12. It is hardly necessary to observe, that any *disposition* by a tenant in tail will be operative under the act ; it may of course be for the sole purpose of barring the estate tail and remainders. This is not a new operation, for it had long been the established mode of barring estates tail in the West India Islands. And it may here be observed, that the disposition will be operative, whether the estate tail was created or agreed or directed to be created by deed, will, private act of Parliament or otherwise, and all appointments under original or derivative powers are deemed parts of the original deed ; and as to wills, the time of the testator's

death is to be considered the time when the settlement was made (*i*). But of course a deed executed under the act can only have the operation conferred upon it by the act: such a deed executed by a tenant for life, therefore, can have only an innocent operation, as at common law, for no tortious force is given to it by the act; indeed, not having been executed by a tenant in tail, the deed can have no statutable operation (*k*).

13. As to the manner of the disposition, the act draws a clear distinction between dispositions *resting in contract*, which are not to be of any force at law or in equity under the act (*l*), and interests actually created; for the tenant in tail is empowered, as we have seen, to dispose of the lands entailed for an estate in fee-simple, or for any less estate (*m*),—that is, any estate in equity as well as at law, and also any interest, charge, lien, or incumbrance in, upon, or affecting lands either at law or in equity (*n*). And the act, in declaring the operation of estates created for a limited purpose, provides that if by a disposition under the act by a tenant in tail, an interest, charge, lien, or incumbrance shall be created without a term of years absolute or determinable, or any greater estate for securing or raising the same, such disposition shall in equity be a partial bar only (*o*). Interests, charges, liens, or incumbrances may therefore be created by a tenant in tail under the act, without raising an actual estate to secure them; but they must be created, and not left to rest in contract. A mere contract to make a mortgage upon an entailed estate would not operate *under*

(*i*) Sec. 1.

(*k*) Slater *v.* Dangerfield, 15
Mees. & Wels. 263.

(*l*) Sec. 40.

(*m*) Sec. 15.

(*n*) Sec. 1.

(*o*) Sect. 21; *post*, pl. 19, 20.

the act, but an actual charge executed according to the provisions of the act would ; and in the common case of a mortgage duly made, and then a further charge, that charge may be created just in the old fashion, only it must be by deed, and the deed must be enrolled, and the proper consent obtained according to the act.

14. But there is nothing to affect contracts as such, and therefore, although they will not operate to bar or bind the entail under the act, nor can equity give to them that operation, yet they may still be recovered upon at law, or be made the foundation of a specific performance against the tenant in tail.

15. Women who are seised in tail under existing settlements *ex provisione viri* are prevented from exercising such power of disposition without the assent now required by law ; but as to future settlements, the act of 11 H. 7, c. 20, is repealed (*p*). The power of disposition is not however extended to tenants in tail within the 34 & 35 H. 8, or who by any other act are restrained from barring their estates tail, or to tenants in tail after possibility of issue extinct (*q*).

16. If a tenant in tail of lands under a settlement (that is, an actual tenant in tail, or a person who, where an estate tail shall have been barred and converted into a base fee, would have been tenant of such estate tail if the same had not been barred (*r*), either before or after the act, has created a *voidable* estate in favour of a purchaser for valuable consideration, then any subsequent assurance by him under the act (other than a lease not requiring enrolment), will, whatever may have

(*p*) Sec. 17.

Railway Company, 5 Bing. N. C. 27.

(*q*) Sec. 13 ; see Duke of Grafton v. London and Birmingham

(*r*) See sec. 1.

been its object, and whatever may be the extent of the estate intended to be thereby created, fully confirm such voidable estate to the extent of the tenant in tail's power under the act, according as he may do the act with or without the consent required by the act, and which we shall presently point out (*s*), but if such disposition is made to a purchaser for valuable consideration, who shall not have *express* notice of the voidable estate, then the voidable estate will not be confirmed as against such purchaser.

17. This was a very proper qualification. A purchaser will be able to ascertain whether a fine or recovery has been levied or suffered or a statute deed executed and enrolled, and he will not be bound by voidable estates of which he had not express notice (*t*).

18. In like manner (*u*) after the 31st December 1833, power is given to the persons who would have been tenants in tail if the entail had not been barred and converted into a base fee, either before or on or after that day, to dispose of the lands as against all persons, including the Crown, whose estates are to take effect after the determination of or in defeasance of the base fee into which the estate tail shall have been converted, so as to enlarge the base fee into a fee-simple absolute, saving the rights of all persons in respect of estates prior to the estate tail which shall have been converted into a base fee, and the rights of all other persons except those against whom such disposition is by this act authorized to be made, so as to enlarge the base fee into a fee-simple absolute, but not to affect prior estates. But (*x*) the act does not enable any

(*s*) Sec. 33, *post*, s. 3, pl. 23.

(*u*) Sec. 19; and see sec. 39.

(*t*) *Vide post*, s. 3, pl. 3.

(*x*) Sec. 20.

issue, in respect of his hope of succession (I), to dispose of the entailed property, which restrains the power that issue in tail had during the lifetime of the tenant in tail, to bind the estate tail by a fine with proclamations, provided they or their issue afterwards succeeded to the estate tail.

19. A disposition by a tenant in tail, by way of mortgage or for any other limited purpose, is an absolute bar in equity as well as at law *to the extent of the estate created*, against all persons who under the act can be barred, notwithstanding any intention to the contrary may be expressed or implied in the deed (y). But if the estate created by *such* disposition shall be only an estate *pour autre vie*, or for years, absolute or determinable, or if by a disposition under the act by a tenant in tail of lands an interest, charge, lien, or incumbrance shall be created without a term of years, or any greater estate for securing or raising the same, such disposition is in equity to be a bar only so far as may be necessary to give full effect to the mortgage, or to such other limited purpose or charge, or to such interest, lien, charge, or incumbrance, notwithstanding any intention to the contrary, express or implied, in the deed.

20. So that a disposition for a limited purpose, if it create only an estate *pour autre vie*, or a term of years absolute or determinable, or a charge without any estate to secure it, is only a bar of the entail *pro tanto*, although an intention is expressed or implied that it

(y) Sec. 21.

(I) The words of the English act (s. 20) are "expectant interest;" in the Irish act they are "expectant interest or possibility," s. 17; 4 & 5 Will. 4, c. 92; see 7 & 8 Vict. c. 76, s. 5; 8 & 9 Vict. c. 106, s. 6; see s. 9, *post*.

should operate as a total bar: to give effect to such an intention the deed must contain a further valid disposition to the extent intended; whilst, on the other hand, a disposition creating an actual estate greater than an estate *pour autre vie*, will operate as a total bar of the estate tail, to the extent of the estate created, although it be only as a security, and the deed declare that it is intended to be a bar *pro tanto* merely: to give effect to that intention the estate tail must be relimited, subject to the interest created. In either case the further limitations may be created by the same deed; for although the statute denies effect to a mere intention, whether implied or expressed, yet it does not, of course, prohibit the express limitation of the old or any other uses which the tenant in tail may choose to introduce. The clause is skilfully yet singularly framed: but it expressly denies, in the general case provided for, effect to an express declaration *confining* the operation of the deed to the incumbrance created, whilst it equally denies, in the excepted cases, effect to an express declaration *extending* the operation of the charge beyond its immediate purpose: the object was to put an end to such questions as arose in *Jackson v. Innes* (z).

21. If a base fee in any lands, and the remainder or reversion in the same lands be united in the same person, and at any time there is no intermediate estate between them, the base fee will not merge, but will be *ipso facto* enlarged into as large an estate as the tenant in tail, with the consent of the protector, might have created under the act if such remainder or reversion had been vested in any other person (a). This is a great improvement on the old law.

(z) 1 Bligh, 123; Sugd. H. of L. 174. (a) Sec. 39.

SECTION III.

OF THE OFFICE OF PROTECTOR.

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| <p>2. <i>What prior estate gives the office.</i></p> <p>3. <i>Undivided shares : husband and wife.</i></p> <p>4. <i>Estates by confirmation give the right.</i></p> <p>5. <i>Lessees at a rent, dowress, bare trustee or representatives, not entitled.</i></p> <p>6. <i>Office accelerated.</i></p> <p>7. <i>Savings of rights under existing settlements.</i></p> <p>8. <i>Where a seller of a remainder may bar it.</i></p> <p>9. <i>Where a protector may be appointed.</i></p> <p>10. <i>Where the court will not appoint a protector in making a settlement.</i></p> <p>11. <i>Saving of right of bare trustees.</i></p> <p>12. <i>Infant tenant in tail of estate to be sold for payment of debts.</i></p> <p>13. <i>Tenant in tail selling before he has disentailed the estate.</i></p> | <p>14. <i>Lunatics, traitors, infants, want of protector, &c., represented by Lord Chancellor or Court of Chancery.</i></p> <p>15. <i>Land in Great Britain, lunatic in Ireland.</i></p> <p>16. <i>Wife of felon and the Court can jointly consent.</i></p> <p>17. <i>Lunatic tenant for life of land-money, remainder-man in tail allowed to dispose of his interest.</i></p> <p>18. <i>No jurisdiction where lunatic tenant in tail : consent to be for benefit of lunatic's family.</i></p> <p>19. <i>Base fee not enlarged to the detriment of lunatic's family.</i></p> <p>20. <i>Remainder in lunatic will not be barred except in special case.</i></p> <p>21. <i>Leases of lunatic's estate.</i></p> <p>23. <i>Protector's consent necessary.</i></p> <p>25. <i>Uncontrollable.</i></p> <p>26. <i>Consent cannot be revoked.</i></p> <p>27. <i>Married woman's consent.</i></p> |
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1. As the old tenant to the *præcipe* could not be preserved under the new plan, the act proceeds to create a *Protector* of every settlement, whose concurrence in barring estates tail in remainder is required, in order to continue, under certain modifications, the control of the tenant for life over the remainder-men.

2. With this view, it is enacted (*a*), that if, at the time when there shall be a tenant in tail under a settlement, there shall be subsisting in the same lands, or any of them, under *the same settlement* any estate for years determinable on a life or lives, or any greater estate (not being an estate for years) prior to the estate tail, then the owner of the prior estate, or the first of such prior estates, if more than one, then subsisting under the same settlement, or who would have been so if no absolute disposition thereof had been made (the first of such prior estates, if more than one, being, for all the purposes of the act, deemed the prior estate), shall be the protector of the settlement, so far as regards the lands in which such prior estates shall be subsisting, and shall, for the purposes of the act, be deemed the owner of such prior estate, although the same may have been charged or incumbered, either by the owner thereof or by the settlor, or otherwise howsoever, and although all the rents and profits be exhausted or required for the payment of the incumbrances on such prior estate, and although such prior estate may have been absolutely disposed of by the owner, or by or in consequence of his bankruptcy or insolvency, or by any other act or default of such owner. An estate by the curtesy in respect of the estate tail, or any prior estate created by the same settlement, is to be deemed a prior estate under the same settlement within the meaning of the clause, and an estate by way of resulting use or trust to or for the settlor is to be deemed an estate under the same settlement.

3. Provisions are then made (*b*) for making each owner of an undivided share the protector of such

(*a*) Sec. 22.

(*b*) Sec. 23.

share, so that if there are two persons tenants in tail, each may alone acquire the fee in his moiety under the statute (c) ; and (d) for making the husband and wife the protector of a settlement where she, if single, would have been the protector in respect of a prior estate, unless her estate shall by the settlement have been settled or agreed to be settled to her separate use, in which case she alone is to be the protector. The preceding section declares that where there are joint tenants or tenants in common, each shall be a distinct protector as to his own share ; but as this was not intended to apply to the case of husband and wife, the concurrence of both is made requisite to the disposal of any part of the property (e).

4. Except in the case of a lease, which is afterwards provided for, where an estate is limited by a settlement by way of confirmation, or where the settlement has merely the effect of restoring an estate, in either of those cases such estate is, so far as regards the protector of the settlement, to be deemed an estate subsisting under such settlement (f).

5. But it is provided (g), that a lease at a rent created or confirmed by a settlement shall not make the owner of it the protector, nor (h) shall any woman in respect of her dower, nor (except in the case after provided for of a bare trustee under a settlement made on or before the 31st December 1833) any bare trustee (I), heir, executor, or administrator in respect of

(c) See *Church v. Edwards*, 2 Bro. C. C. 180.

(d) Sec. 24.

(e) See 1 Phill. 261.

(f) Sec. 25.

(g) Sec. 26 ; and see sec. 25.

(h) Sec. 27.

(I) See s. 27, and observe the discrepancy as to dates ; but s. 27 would, it should seem, enlarge s. 31 ; vide *post*.

any estate, taken by him as such bare trustee, heir, executor, administrator, or assign, be the protector.

6. But where under any settlement there shall be more than one estate prior to an estate tail, and the person who shall be the owner within the meaning of the act of any such prior estate, in respect of which, *but for the two last preceding clauses, or either of them*, he would have been the protector of the settlement, shall by virtue of such clauses, or either of them, be excluded from being the protector, then the person (if any) who, if such estate did not exist, would be the protector of the settlement is made such protector (*i*).

7. But where already before the 31st December 1833, an estate under settlement has been disposed of, either absolutely or otherwise, and either for valuable consideration or not, the person who in respect of such estate would, if the act had not been passed, have been the proper person to make the tenant to the *præcipe*, will, during the continuance of the estate which conferred the right to make the tenant to the *præcipe*, be the protector of such settlement (*k*), and (I) the act

(*i*) Sec. 28.

(*k*) Sec. 29.

(I) It is observed, in a note to Mr. Hayes' able commentary on the statute, that a point arose in *Corrall v. Cattell*, 4 Mees. & Wels. 734 (and see *Cattell v. Corrall*, 3 You. & Coll. 413), whether, under a conveyance prior to the 31st December 1833, by a tenant in tail, under a will to trustees for the life of a grantor, upon certain trusts, the bare trustees were the protectors, that the decision turned upon another point; but the impression of the Court seemed to be, that the trustees were *not* protectors. Of five counsel whose opinions were taken, three (including two of the Real Property Commissioners) also thought that they were *not* protectors, while two (of whom Mr. Preston was one) thought that the trustees *were* protectors. The learned author adds, that the act is not fairly chargeable with that degree of obscurity which this conflict of opinions supposes. The clauses (ss. 27, 29, 31), when construed with due

provides (*l*) for the case of a disposition of a remainder or reversion in fee on or before the 31st December 1833, so as to prevent the grantor as protector under the act from concurring in the barring of such remainder or reversion, which he could not have done if he had not been such protector.

8. The provision upon which we are commenting does not extend to *future* cases; therefore if tenant for life or for years determinable on his life, with remainder to his sons in tail, with remainder or reversion to himself in fee, were to sell and convey the life interest and the remainder or reversion, he would still be the protector, and could at any time during the continuance of the life interest consent to a statute deed of disposition by the tenant in tail which would bar the remainder or reversion; or in other words, he might in substance resell the remainder or reversion to the tenant in tail, for he may make what bargain he can with the tenant in tail, and a covenant by him with the purchaser *not* to exercise his power of consenting would be simply void. This operation of the statute should not be lost sight of in practice.

9. The statute protector may be excluded by the settlor, who, by the settlement creating the entail, may appoint not more than three persons *in esse*, and not being aliens, to be protector, and either for the whole or any part of the period for which the person excluded might have continued protector; and he may, by means of a power to be inserted in such settlement, perpe-

(*l*) Sec. 30.

attention to the scheme of the act, warrant the conclusion that the trustees were protectors: 1 Hayes' Com. 177. In this conclusion I entirely concur.

tuate during the whole or any part of such period the protectorship in any person or persons *in esse* (not being aliens) whom the donee of such power shall by deed appoint in the place of any who shall die, or by deed relinquish the office ; and the person or persons so appointed shall, in case of there being no other person the protector of the settlement, be the protector, or if there is any other protector, be the protector jointly with such other person ; but the number of old and new is never to exceed three. The deed of appointment or of relinquishment is made void unless it is enrolled in the Court of Chancery within six calendar months after its execution. The statute sole protector may be appointed one of the protectors under this clause if the settlor think fit, and he is, unless otherwise directed by the settlor, to act as sole protector if the other persons shall cease to be protector by death or relinquishment of the office by deed, and no substitute shall have been appointed (*m*).

10. Where a settlement was made of an estate to go along with a barony in fee under the direction of the Court, the Vice-Chancellor refused to appoint a protector during the lives of the several tenants for life. He thought that the trustee being the trustee in trust to settle, was a settlor within the meaning of this section, and though he was to settle as the Court should direct, yet unless there was good reason to the contrary, the Court ought to let him exercise his discretion, and he did not desire to appoint a protector. In the next place, the learned Judge added, the act itself furnished reasons why a protector should not be appointed by the Court unless upon a special case, for a protector is

made irresponsible, and is at liberty to act from mere caprice, ill will, or any bad motive: he is enabled to take a bribe for giving consent. It was better to commit the protection of the estate to the members of the family who would successively enjoy the settled estate, and would best understand their own interests, than to strangers, who would have the statutory privilege of being uncontrollably perverse and corrupt (*n*).

11. The act preserves to a bare trustee under any existing settlement, who would have been the proper person to make the tenant to the *præcipe*, the right as the protector of such settlement (*o*) during the continuance of the estate, conferring on him the right to make the tenant to the *præcipe* (*p*).

12. An infant tenant in tail has been ordered to convey an estate decreed to be sold for payment of debts by an assurance under this act (*q*).

13. And as the act enables a tenant in tail at any period to acquire the fee, a contract of sale by him will be enforced, although the entail remains in him unbarred, and the *contract* will not bind the issue in tail or the remainder-man (*r*).

14. The act substitutes (*s*) the Lord Chancellor in the place of a protector who shall be a lunatic, and the Court of Chancery in the place of a protector who shall be convicted of treason or felony (I), or of a protector,

(*n*) *Bankes v. Le Despencer*, 11 Sim. 508. The Vice-Chancellor also referred to a difficulty, where one of several protectors incurred a disability; see 1 Phill. 258, *post*.

(*o*) Sec. 31; vide *supra*, note.

(*p*) Vide *post*.

(*q*) 1 Will. 4, c. 47, s. 11; *Penney v. Pretor*, 9 Sim. 135; *Radcliffe v. Eccles*, 1 Kee. 130.

(*r*) *Cattell v. Corral*, 4 You. & Coll. 228; Sugd. Concise View, 314.

(*s*) Sec. 33.

(I) There is an omission in the 33d section. The words are: "If any person, protector of a settlement, shall be convicted of treason or felony,

not being the owner of a prior estate under a settlement, who shall be an infant (I), or where it shall be uncertain whether he be living or dead. The Court of Chancery is also substituted during the continuance of the prior estate where the settlor declares that the person who, as owner of a prior estate under such settlement, would be entitled to be protector shall not be such protector, and does not appoint any protector in his stead. And also in every other case where there shall be subsisting, under a settlement, an estate prior to an estate tail under the same settlement, and such prior estate shall be sufficient to qualify a protector, and there shall happen to be no protector, the Court of Chancery, during the continuance of the prior estate, is to be the protector (II).

15. The residence of the lunatic in Ireland is immaterial if the land is in Great Britain, for the question is governed by the locality of the estates, and therefore the Lord Chancellor of Great Britain will be the protector, and not the Lord Chancellor of Ireland (*t*).

16. Where a married woman is tenant for life and

(*t*) *In re Graydon*, 14 Jur. 157.

or if any person not being the owner of a prior estate under a settlement shall be the protector of such settlement, and shall be an infant, or if it shall be uncertain whether such last-mentioned person be living or dead, then the Court of Chancery shall be the protector of such settlement in lieu of the person who shall be an infant, or whose existence cannot be ascertained—omitting the case of a person convicted of treason or felony. But these words have been supplied by implication : 1 Phill. 261.

(I) How can this happen? Only adults and persons *in esse* can be appointed protectors, irrespective of estate.

(II) Sect. 48 enables the Lord Chancellor, &c., where he or the Court is the protector of a lunatic or of a settlement, in a summary way to consent to a disposition by tenant in tail, and to make the necessary orders; but if there is any joint protector, he must also concur. And s. 49 makes the order evidence of the consent.

her husband is convicted of felony, the Court of Chancery becomes the protector in lieu of the husband, and the Court and the wife together can consent to a disposition of the property (*u*).

17. It has been held that where the tenant for life is a lunatic, the Lord Chancellor may enable his son, entitled in remainder to a sum which ought to be laid out in land, of which he would be tenant in tail in remainder, to dispose of the fund, subject to the life interest (*x*).

18. But the Lord Chancellor has no jurisdiction where the tenant in tail, although a lunatic, is tenant in tail in possession (*y*). Where the Chancellor had jurisdiction, the consent was given where the intention was to provide for the immediate family of the lunatic, but withheld where the object was to give a benefit to one member of the family at the expense of the others. As protector of the settlement, the only duty of the Court is to see what, with reference to the interests of the family, it would be proper for the tenant for life to do, and the object should be rather to protect the objects of the settlement than to give any benefit to one member of the family to the exclusion of the others (*z*).

19. Where a lunatic was tenant for life, remainder to his sons in tail, remainder to his daughters in tail, remainder to the lunatic's brother in tail, with remainders over, and his only child a daughter, who of course was tenant in tail in remainder, on her marriage set-

(*u*) *In re Wainewright*, 11 Sim. 352; 13 Sim. 260, reversed 1 Phill. 258; see 11 Sim. 527, 528.

(*v*) *Grant v. Yea*, 3 Myl. & Kee. 245.

(*y*) In the matter of *Blewitt*, 3 Myl. & Kee. 250. In the matter of *Wood*, 3 Myl. & Cra. 266.

(*z*) *In re Newman*, 2 Myl. & Cra. 112.

tled the estates (so as to create a base fee, and she and her husband covenanted to enlarge the base fee after the death of the lunatic) on herself for life, remainder to her husband for life, remainder *to such persons as she should appoint*, and in default of appointment, to the issue of the marriage, with remainder to her heirs, &c., and there was no child of the marriage, the Lord Chancellor said, that looking to the interests of the wife and her children, were he to consent to the enlargement of the base fee, he should exercise his discretion improperly. The effect of so doing would be to take away the estate from the lunatic's family and give it to the daughter's husband (*a*).

20. Nor would the Chancellor as protector consent to a deed which would bar a remainder or reversion in the lunatic (*b*); a case, however, might arise in which it would not be improper to give such a consent.

21. The act does not enable the Chancellor to permit the committee to make any lease which the Chancellor on behalf of the tenant in tail could not have authorized prior to the passing of the act, for that would be to enable the committee to bar the estate tail *pro tanto* (*c*).

22. Having thus provided who shall be the protector, the act then proceeds to declare in what cases his concurrence shall be necessary.

23. No actual tenant in tail (*d*), not having the remainder or reversion in fee immediately expectant on

(*a*) In the matter of Graydon,
1 Mac. & Gor. 655.

(*b*) *In re* Wood, 3 Myl. & Cra.
266.

(*c*) *In re* Starkie, 3 Myl. & Kee:
247.

(*d*) Sec. 34.

his estate tail, under a settlement where there is a protector, can dispose of the estate to the full extent authorised by the act, without the consent of the protector, but he may without such consent dispose, under the act, of the estate entailed against all persons who by force of any estate tail which shall be vested in or might be claimed by, or which, but for some previous act or default, would have been vested in or might have been claimed by, the person making the disposition at the time of his making the same, shall claim the lands entailed. And (*c*) although the estate be converted into a base fee, yet as long as there is a protector of the settlement by which the estate tail was created, his consent is requisite to the power of disposition given by the act.

24. These provisions preserve the like powers to tenants in tail in remainder which they before enjoyed : they could by a fine with proclamations bar the estate tail and obtain a base fee without the concurrence of the immediate freeholder, in whose place the protector now stands, and they may now do so by a statute deed without the consent of the protector.

25. The power of the protector to consent is made absolute ; his discretion is absolute and uncontrollable even by a court of equity, and any device, shift, or contrivance to control the protector in giving his consent, or to prevent him in any way from exercising his absolute discretion in regard to his consent, and also any agreement entered into by him to withhold his consent, is made void. Nor can his giving his consent be deemed a breach of trust, for he is not to be deemed a trustee of the power (*f*). Nor are the rules of equity in relation to

(*c*) Sec. 35.

(*f*) Sec. 36 ; see 11 Sim. 527.

dealings and transactions between a donee of a power and any object of the power in whose favour the same may be exercised, to apply to this case (*g*).

26. After a consent has been duly given, the protector cannot revoke it (*h*).

27. A married woman being a protector, either alone or jointly with her husband, may consent as a feme sole (*i*).

(*g*) Sec. 37.

(*h*) Sec. 44.

(*i*) Sec. 45.

SECTION IV.

WHAT DEEDS ARE TO BE EXECUTED BY TENANTS IN TAIL AND PROTECTORS, AND OF THE GENERAL OPERATION OF THE ACT.

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| 1. <i>A deed of conveyance : married woman : contracts inoperative under the Act.</i> | 12. <i>Protectors by estate, or by nomination.</i> |
| 2. <i>Protector, how to consent.</i> | 13. <i>Estate may be legal or equitable.</i> |
| 3. <i>Enrolment.</i> | 15. <i>Bare trustees excluded : operation of act considered.</i> |
| 4. <i>Leases for a certain term, &c. exempted from enrolment.</i> | 16. <i>Assign excluded : like consideration.</i> |
| 5. <i>How conveyance operates.</i> | 17. <i>Power of tenant in tail enlarged.</i> |
| 6. <i>Equitable jurisdiction excluded.</i> | 18. <i>Power of Lord Chancellor, or of Court of Chancery.</i> |
| 7. <i>Quasi entails in estates pur autre vie, or in chattels, unaffected.</i> | 19. <i>Savings of existing settlements.</i> |
| 8. <i>Tenant in tail may still create base voidable fee not under the statute.</i> | 20. <i>Where a remainder has been sold.</i> |
| 9. <i>Retains his old power by the substitute : greater power in one case.</i> | 21. <i>Saving of right of bare trustees.</i> |
| 10. <i>Appointments operate as part of the settlement.</i> | 22. <i>Error in dates.</i> |
| 11. <i>Issue in tail cannot bar his expectancy.</i> | 24. <i>Protector by appointment.</i> |
| | 25. <i>Limit of power : merely substitutionary.</i> |
| | 26. <i>Nature of office.</i> |
| | 27. <i>Purchaser's title under act.</i> |

1. THE act then proceeds to provide by what conveyances a tenant in tail shall convey. Every disposi-

tion of lands is to be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition of his estate if a fee-simple absolute ; but it must be made or evidenced by deed, or it will be of no force *under the act*, at law or in equity. No disposition by a tenant in tail, resting only in contract either express or implied or otherwise, and whether supported by a valuable or meritorious consideration or not, will be of any force, notwithstanding such disposition is made by deed. And the concurrence of the husband of every married woman being a tenant in tail, is made necessary (*a*), and her deed is to be acknowledged by him as afterwards noticed.

2. The protector is authorised to give his consent by the same assurance which effects the disposition, or by a deed distinct from the assurance, and to be executed either on, or at any time before the day on which the assurance shall be made, otherwise the consent will be void ; and the consent will be void unless the deed be enrolled in the Court of Chancery at or before the time when the assurance shall be enrolled : wherever, therefore, the consent is given by a separate deed, these requisitions should be strictly complied with, and it should be executed before any party executes the other deed, and the time of execution should be noticed in the attestations. If given by a separate instrument, it is to be deemed an unqualified consent, unless the particular assurance is referred to, and his consent confined to that disposition (I) ; and, as we have seen, a consent once given cannot be revoked (*b*).

(*a*) Sec. 40.

(*b*) Sections 42, 43, 44, 46.

(I) If the concurrence should be signified by a separate deed, we think it advisable that it should not be allowed to the concurring party to

3. No assurance by a tenant in tail under the act will have any operation under it, unless it be enrolled in the Court of Chancery within six calendar months after its execution, which enrolment will be sufficient of itself, even where the conveyance is by bargain and sale, within the statute of enrolments (27 H. 8.) (c); and every deed required by the act to be enrolled, by which lands shall be disposed of under the act, is, when so enrolled, to operate in the same manner as if enrolment had not been required, except that every such deed will be void against any person claiming the lands, or any part thereof, for valuable consideration, under any subsequent deed, duly enrolled under the act, if such subsequent deed shall be first enrolled (d).

4. But the requisition as to enrolment does not apply to a lease for any term not exceeding twenty-one years, to commence from the date of such lease, or from any time not exceeding twelve calendar months from the date of such lease, where a rent shall be thereby reserved, which, at the time of granting such lease, shall be a rack-rent, or not less than five-sixths of a rack-rent (e). But such a lease cannot be granted so as to operate under the act without the consent of the protector, if there be one, and his consent must be

(c) Sec. 41. (d) Sec. 74; see *post*, s. 8, pl. 2, 3. (e) Sec. 41.

impose any terms on the tenant in tail, as the necessity of seeing whether he had complied with those terms would then be avoided. This will not prevent the parent or other beneficial owner from requiring the estate to be settled in a reasonable manner for the benefit of the family, as he will always have it in his power to do this by keeping back the deed of concurrence until he is satisfied that the estate has been settled in such manner as he has required. 1st Rep. R. P. Commissioners, p. 32. The enactment is an improvement upon this suggestion: the latter should never be acted upon.

by deed ; but it should seem that, although given by a separate deed, it need not be enrolled under the act.

5. To a disposition under the act, a deed, not an indenture, is required (I), but the mode of conveyance is left to the option of the party, and its operation is directed by the former law, except so far as by this law it is made a substitute for a fine or a recovery. Although, therefore, both deeds must be enrolled, yet a lease and release by a tenant in tail will still operate as a conveyance as they did before the late statute ; the lease for a year as a bargain and sale, and the release as such ; and the enrolment will not of itself alter the operation of either of the instruments, and consequently, by such a conveyance an estate tail and remainders may be barred, and the fee limited to any uses and with any powers authorised by law (II). No other alteration ought to be made in a lease and release, as a disposition under the statute, than a recital or declaration in the release of the intention to bar the estate tail and remainders over, although the disposition will have that operation without any such recital. If the tenant in tail convey by a bargain and sale, it must still be an indenture (*f*), as required by the statute, 27 H. 8, but it will be valid if enrolled within the six *calendar* months allowed by this act, and it need not be previously acknowledged.

6. And in regard to both *dispositions and consents*, the jurisdiction of equity is altogether excluded. It is

(*f*) See below, n. (I).

(I) Now a deed executed after the 1st of October 1845, purporting to be an indenture, will have the effect of an indenture, although not indented : 8 & 9 Vict. c. 106, s. 5 ; see 7 & 8 Vict. c. 76, s. 11.

(II) A lease for a year is now unnecessary : 8 & 9 Vict. c. 106, s. 2 ; see 7 & 8 Vict. c. 76, s. 2.

immaterial whether the party is a purchaser for a valuable consideration or not ; the jurisdiction is excluded in regard to the specific performance of contracts, and the supplying of defects in the execution either of the powers of disposition in tenants in tail or of the powers of consent in protectors ; nor under any circumstances can the want of execution of such powers of disposition and consent be supplied, and so in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector of a settlement, which in a court of law would not be an effectual disposition or consent under the act : the deed and consent, therefore, must be effectual in law in order to operate. And equitable entails are placed upon the same footing with legal ones in regard both to dispositions and consents (*g*).

7. Here we may pause to take a cursory view of the preceding enactments, which, it will be observed, do not disturb the law as to *quasi* entails in estates *pur autre vie*, or in mere chattels, which law therefore remains wholly unchanged ; for of course the provisions of this act cannot in regard to estates *pur autre vie* be adopted by analogy, as the whole frame and spirit of the act excludes them, and forbids an application of its enactments to them : the law regarding such interests is left as it was, and so it must remain unless it be changed by the legislature (*h*).

8. No power which a tenant in tail had to convey without the aid of a fine or recovery is taken away, and therefore his conveyance without a compliance with the formalities of this act, will still pass a base fee avoidable by the issue in tail (*i*), and this act makes

(*g*) Sec. 47.

(*i*) *Machell v. Clarke*, 2 Lord

(*h*) See 1 Hayes' Com. 198, and

Raym. 773 ; Sugd. Gilb. Uses, 33,

n.

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any subsequent disposition within the act by the tenant in tail a confirmation of the previous voidable estate, unless as against a purchaser without express notice.

9. Whatever a tenant in tail could have conveyed by a fine or common recovery, he may now convey by a deed enrolled under the statute, so that his power of alienation is not curtailed; it is enlarged, as we have seen, where the estate tail has been divested or is in contingency. If he is tenant in tail in possession, or in remainder, and has the first estate of freehold, or for a term of years determinable for life, he can acquire the fee, subject to any intervening estates between his particular estate and his remainder in tail; and if he is merely tenant in tail in remainder, he may alone, by a statute deed, acquire a base fee, which he may afterwards by another like deed enlarge into a fee-simple, either with or without the consent of the protector, as the case may be. And if he do no act after acquiring the base fee, but the immediate remainder or reversion in fee become vested in him, the latter is *ipso facto* barred, and the base fee enlarged into a fee-simple, and is thus held discharged of all incumbrances which affected the reversion only; whereas formerly by a fine by a tenant in tail with the immediate remainder or reversion in fee, the remainder or reversion would have been let into possession, and the fee in possession would have been liable to all the incumbrances upon the reversion. Where the tenancy in tail, although in remainder, is created by a separate instrument from the estate which would constitute a protector, the tenant in tail, by himself, may bar the entail and remainders over by a statute deed, for the 15th section gives him that power, and the subsequent

sections do not place a protector over him, and this is a greater power than he before enjoyed. And even if in a settlement before the passing of the act a bare trustee had the first estate of freehold (whose right is saved), his consent as protector will not, it seems, in this case be necessary, for the wording of the section (*k*), whether intentionally or not, confines the saving to the case where *under a settlement* before the passing of the act, the person who would have been the proper person to make the tenant to the *præcipe* for suffering a recovery for the purpose of barring any estate tail, or other estate *under such settlement*, shall be a bare trustee, and declares that such trustee shall be the protector of *such settlement*, which seems to confine the right to the same settlement.

10. If, however, the estate tail be created by virtue of a power in the settlement, then the appointment would be considered as part of such settlement, and the estate created by such appointment would be considered as having been created by such settlement (*l*).

11. The issue in tail living the ancestor is, we have seen, restrained from affecting the entail to which he may succeed.

12. Protectors are either in respect of estate or of nomination to the office. The former must have, or have had—for if once a protector by estate, the mere alienation of it does not divest the party of the office, which endures as long as the estate lasts—an estate for a term of years determinable on a life, or some greater estate; a term of years, however long, not determinable upon life, will not be sufficient. This is a restraint upon a tenant in tail which did not before

(*k*) Sec. 31.

(*l*) Sec. 1.

exist; for a termor could not make a tenant to the *præcipe*, and his concurrence, therefore, was not necessary in a recovery; but there was seldom such a prior estate where there was not necessarily also a prior estate of freehold to the estate tail, so that the new provision will rarely abridge the old power. A tenant by the curtesy, in respect of the estate tail, or of any prior estate in the same settlement, will be the protector; and therefore, if a woman tenant in tail die, and her husband is tenant by the curtesy, he will be the protector, and if she left no issue, and there was a remainder in tail in the settlement, he would still be protector. If a married woman have a prior estate, which would create a protector, she alone will be the protector if the estate is settled or agreed to be settled by the settlement creating the estate tail, to her separate use, otherwise she and her husband will together be the protector; a subsequent conveyance or agreement to settle her estate to her separate use will not make her alone the protector.

13. The *estate* which confers upon its owner the office of a protector under the act, may be indifferently either legal or equitable, provided it be vested in the party as owner. For the word *estate* is declared to mean an estate in equity as well as at law; and as, with reference to future settlements, the act deprives a bare trustee of the right to the office, only the owner, whether of the legal or equitable estate, can be a protector in right of his estate.

14. This happily abolishes all the refined distinctions between legal and equitable tenants to the *præcipe*, and provided a person be protector and consent, the bar under the act will be effectual whether the pro-

tector was seised of the legal or only of the equitable estate, and it is immaterial whether the estate tail be a legal or an equitable one.

15. But there is a provision in the act on this head which is not free from difficulty. After the exclusion of bare trustees and heirs and others in s. 26 and 27, it is enacted by s. 28, that where under any settlement there shall be more than one estate prior to an estate tail, and the person who shall be the owner within the meaning of the act of any such prior estate in respect of which but for the two last preceding sections, or either of them, he would have been the protector of the settlement, shall, by virtue of such clauses, or either of them, be excluded from being the protector, then the person, if any, who, if such estate did not exist, would be the protector of the settlement, shall be such protector. Now does this provision substitute an equitable owner as the protector in the place of a bare trustee? The act does not say that the owner of the *next* estate shall be the protector, but that must be its operation where a prior estate devolves upon the heir, executor or administrator of the person who was entitled to it. Thus if an estate be limited beneficially to *A* and his heirs for the life of *B*, remainder to *C* in tail, and *A* die living *B*, *A*'s heir will take the estate *pur autre vie*, and *C* would no longer be fettered with a protector. In that case therefore the office passes over to the owner of the next prior estate or ceases. But suppose the legal estate to be limited to *A* and his heirs for the life of *B* in trust for *B*, remainder to *C* in tail, with remainder over, if the act is to operate *in like manner*—and it is undoubtedly difficult to give a different construction to the same words—as *A* cannot take the

office because he is a mere trustee, and to *B* it is not given, *C* would have no protector over him, although there was a subsisting prior beneficial ownership of the freehold. If *B* is to be the protector, the words of the act must not only receive two different constructions, but the *equitable* owner must be held to be described as a person who, if the excluded estate *did not exist*, would be the protector of the settlement. Now that accurately describes the owner of the next estate, but it does not so describe an equitable owner, for it by no means follows that if the legal estate did not exist the equitable estate ever would have existed. And it may be urged that the words in the beginning of s. 28, “where under any settlement there shall *be more than one estate* prior to an estate tail,” can only be held to describe one estate, viz. a legal estate in *A* in trust for *B*. In favour, however, of the manifest intention of the act, it would no doubt be held that the equitable owner takes the office in substitution of the legal tenant. For the act previously (by s. 22) vests, as it seems, the office in the beneficial owner, and a bare trustee is afterwards expressly excluded, which will effect the real intention of the act, and s. 28 may be held not to operate upon this particular case.

16. Some embarrassment is occasioned by the introduction of the word assign in the 27th section amongst the persons who are excluded from the office of protector, because an assign is in effect excluded by the 22d section, which continues the owner of the prior estate as protector, although he has conveyed away his estate, and the substitution clause (s. 28) introduces a question whether where an assign is excluded the office is not to pass over to the owner of the next estate.

But the express enactment in s. 22 will doubtless be held to explain the provision in s. 27, so as to exclude the assign without divesting the original owner of his office under s. 22 by force of the enactment in s. 28.

17. The above provisions very much enlarge the power of a tenant in tail, for no lessee at a rent, dowress, heir, executor or administrator can in respect of an estate be a protector. If there be a settlement on *A* and his heirs, or on *A* and his executors and administrators, beneficially for the life of *B*, remainder over in tail, and *A* die, although his heir, or his executor, or administrator will take the estate beneficially, yet he will not be the protector; but notwithstanding that the prior estate remain in existence, the tenant in tail in remainder will be able to acquire the fee without the concurrence of any other person.

18. The act constitutes the Lord Chancellor the protector in certain cases, and then adds, that if in any other case where there shall be subsisting under a settlement an estate prior to an estate tail under the same settlement, and such prior estate shall be sufficient to qualify the owner thereof to be the protector of the settlement, there shall happen at any time to be no protector of the settlement as to the lands in which the prior estate shall be subsisting, the Court of Chancery shall, while there shall be no such protector, and the prior estate shall be subsisting, be the protector of the settlement as to such lands (*m*). It may perhaps be contended that this clause substitutes the Court of Chancery for the bare trustee, &c. whilst the estate continues, but that construction seems to be excluded by the frame of the act, and by the 28th section, which

substitutes the owner of the next estate without any reference to the Court of Chancery. And the case intended to be provided for by this part of the 33d section of a sufficient prior estate, and no protector, is perhaps where the protector by estate is excluded, and there is for the time no other protector, although one was appointed.

19. In regard to rights existing on or before the 31st of December 1833, where the estate has been aliened before that day, the alienee will be the protector, just as, if the act had not passed, he would have been the person to make the tenant to the *præcipe*. And as the clause (s. 29) speaks of "an estate under a settlement," which would include not only a prior estate but the estate tail itself, the alienee of the tenant in tail is the protector under the act, so that his concurrence would be necessary to enable the tenant in tail to bar the remainders over where any remained unbarred. But by the wording of the section, this case of a disposition on or before 31 December 1833, seems to be confined to cases where the prior estate, if any, and the estate tail, were created by the same settlement.

20. Under this saving a person who has departed with an interest in a remainder or reversion in fee, is not allowed to be the protector, so as to enable him to destroy the very estate he had created or transferred; but the proper person to have made a tenant to the *præcipe*, if the act had not passed, is to be the protector. This, however, may still prove to be the person who sold or charged the remainder: *e. g.* where an estate is settled on *A* for life, remainder to *B* in tail, remainder to *A* in fee, and *A*, within the time limited,

charged his remainder with an incumbrance, he would still be the person to make the tenant to the *præcipe*, and therefore would still have it in his power to concur in an act which would destroy his charge ; but as he would equally have had this power if the act had not passed, it was not the intention to relieve the party from this power over him.

21. And, as we have seen, the right even of a bare trustee is saved under a settlement made on or before the 31st December 1833, only that in form he is made the protector instead of being left with the power to make a tenant to the *præcipe*, and he will remain protector during the continuance of the estate conferring on him the right to make the tenant to the *præcipe*. This is important. If an estate were before the day named vested legally in *A* for the life of *B*, in trust for *B*, remainder to *C* in tail, with remainders over, although *A* were now to convey his legal estate to *B* or to *C*, yet the estate tail and remainders could not be barred without the concurrence of *A* as protector. It should besides be borne in mind, that although a man remains the protector after he has conveyed away the estate, yet the statute itself does not divest or transfer the particular estate from the protector.

22. A slight difficulty has been occasioned by the 27th section, which prevents bare trustees from being protectors, having a saving in these words, “ except in the case hereinafter provided for, of a bare trustee under a settlement made on or before the 31st day of December 1833,” whilst the section (31) by which effect was intended to be given to that exception, speaks only of “ any settlement made before the

passing of this Act ;” and the act passed on the 28th August 1833. Now one thing is quite clear, that the mistaken reference (which will readily be accounted for by the experienced draftsman, when he casts his eye over the act) in the 27th section to the 31st, does not affect in any manner the operation of the 31st section, which therefore clearly extends to settlements made before the 28th August 1833. And taken in connexion with the 27th section, that time, it is apprehended, would be enlarged to the 31st December 1833. This would effectuate the intention and do no violence to the words of the statute.

23. We have already observed, that this clause appears to be confined to the case of a bare trustee under the same settlement which created the estate tail. It is rather to be regretted that the language of the statute in this respect is not uniform.

24. Thus far the analogy has been preserved between the old and the new law: the prior estate, although the nature of it has been changed, is the foundation of the right of a protector, but he will retain the office, although he has departed with the estate whilst the estate continues; and if he is still owner of the estate, yet he need not, as formerly, convey it, but in either case his consent is sufficient. But the settlor may altogether defeat this right; he may by the settlement appoint any persons of age, not being aliens, to fill the office, without reference to estate, and he may include, if he please, the person who would have been protector by force of estate; and he may reserve a power to himself or give it to any other person to fill up

vacancies in the office. If he take away the right by office and appoint no substitute, the office devolves on the Court of Chancery. But if he do not altogether exclude him, the office will rest in the statute protector if there shall be no other protector. If a protector be a lunatic or felon, the Lord Chancellor in the one and the Court of Chancery in the other case can act for him. If an infant be the protector *as the owner of a prior estate*, no consent can be given by him or for him during his minority; but if he be protector, not being owner of a prior estate, the Court of Chancery is substituted for him, as that Court is where it is uncertain whether a protector, not being the owner of a prior estate, be living or dead. And that Court is temporarily substituted wherever a prior estate sufficient to qualify a protector has been created, and there happens to be none.

25. But the settlor of course cannot create a protector so as to restrain the tenant in tail, where there is no prior estate in the settlement sufficient to qualify a protector; his power is expressly one of substitution only in the place of the persons who would otherwise have been the protector of the settlement, and it may be exercised for the whole or any part of the period for which such persons might have continued protector; the power, therefore, is co-extensive with the *beneficial* estates in the settlement prior to the estate tail, which would by the statute law qualify a protector.

26. The protector is altogether a new creation: he is placed beyond the control of equity, and therefore can make what bargain he pleases as the price of his concurrence; the tenant for life continues to be the

protector of a settlement even after he has sold the estate, or it has passed from him by bankruptcy or insolvency. This appears to be unwise. For the act takes away the control of equity over the protector; declares that his discretion is absolute; that he cannot commit a breach of trust; and that the doctrines of equity applicable to a donee of a power dealing with an object of the power are not to be applied to him. He may, therefore, make what bargain he pleases with the tenant in tail after the *natural* check (for such the possession of the first estate may fairly be considered) has been conveyed away. In the case of a bankrupt, he may acquire a great property as against his creditors, and a case may occur in which he may by his concurrence enable the first tenant in tail to bar a subsequent remainder vested by his bankruptcy in his own assignees. And where the existing estate of a naked trustee is saved, even the trustee may make what bargain he can, for no distinction is made by the act in that respect, although future cases are provided for by depriving naked trustees of the office of protector.

27. It cannot be too strongly impressed upon purchasers, that their title will depend upon the legal validity of the dispositions under the statute: nothing can be supplied;—if the instrument, for example, be not a deed, or being a deed, is not enrolled in the proper court in due time, it will be absolutely void, and equity cannot set it up. And although equity, notwithstanding the stringent clauses in the act, will still be able to compel *a seller* to make a new valid conveyance, yet that could not be enforced against the issue, nor could it be enforced against a protector. No purchaser can be deemed safe unless the deeds are properly en-

rolled, and he should not part with his money until that is done. But careless practitioners will undertake to enrol the deeds for their own clients, taking from the seller the amount of the expense; and then, as past experience proves, the deeds will sometimes not be enrolled, and the purchaser will lose the estate.

SECTION V.

OF COPYHOLDS.

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| 1. <i>Legal and equitable tenants in tail, how to convey: consent of protectors.</i>
2. <i>Where the consent is not by deed.</i> | | 3. } <i>Equitable tenant in tail may</i>
6. } <i>convey by deed or surrender.</i>
4. <i>Prior purchaser without notice</i>
<i>protected.</i>
5. <i>Enrolment.</i> |
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1. COPYHOLDS are within the act, and all the previous clauses, so far as circumstances and the different tenures will admit, are to apply to copyholds; but surrenders are to be made by legal tenants in tail, and surrenders or deeds are to be made or executed by equitable tenants in tail (*a*). And the mode in which the protectors are to consent is particularly pointed out (*b*). Where the consent is given by deed, such deed, either at or before the time when the surrender is made, must be executed and be produced to the

(*a*) Sections 50 and 53; as to customary freeholds, see *Regina v. Ingleton*, 8 Dowl. Cas. 693; see the cases in the note to p. 342 of Mr. Shelford's very useful treatise

on the Real Property Acts, 5th edit.; and see Browell, on the Statutes, 106, n.

(*b*) Sections 51, 52, 53.

lord or steward, without which the consent will be void. An acknowledgment of the production of the deed within the time limited is to be endorsed "by writing under the hand of the lord, steward, or deputy steward," and the deed, with the endorsement, is to be entered on the court rolls; and the endorsement purporting to be so signed, is of itself to be *prima facie* evidence that the deed was produced within the time limited, and that the person who signed the endorsement was the lord or his steward, or the latter's deputy; and after such deed shall have been so entered, the lord or steward, or his deputy, is to endorse on the deed a memorandum, signed by him, testifying the entry on the rolls (c).

2. Where the consent is not by deed, it is to be given by the protector to the person taking the surrender, or if the surrender is made out of court, it must be stated in the memorandum of it that such consent has been given, and the memorandum is to be signed by the protector, and the memorandum with the consent is to be entered on the court rolls, and such memorandum is to be good evidence of the consent and of the surrender, and the entry of the memorandum, or a copy of such entry is to be as available for the purposes of evidence as any other entry on the rolls, or a copy thereof; but if the surrender be made in court, the lord or steward or deputy is to cause an entry of such surrender, containing a statement that such consent had been given, to be made on the rolls, and the entry of such surrender, or a copy of such entry, is to be as available for the purposes of evidence as any other entry on the rolls, or a copy thereof (d).

3. Equitable tenant in tail may bar the entail by deed just as in freeholds, and the deed is to be entered on the court rolls ; and if a protector consent by a distinct deed the consent is void, unless the deed be executed by the protector, either on or at some time before the day on which the deed of disposition is executed by the equitable tenant in tail, and it is made imperative on the lord or steward or deputy, when required, to enter such deeds on the rolls, and to indorse on each deed so entered a memorandum, signed by him, testifying the entry on the rolls (*e*).

4. But to this last provision there is added an important proviso, that every such deed of disposition shall be void against any person claiming such lands, or any of them, for valuable consideration under any subsequent assurance duly entered on the court rolls, unless the deed of disposition by the equitable tenant in tail be entered on the court rolls before the subsequent assurance is entered (*f*). In giving this priority to a subsequent purchaser the act is silent about notice, and having regard to the general frame and objects of the statute, and the provisions in it respecting notice, it is not improbable that notice will not be held to supply in equity the want of an entry on the court rolls. The operation of the deed depends altogether on the statute, and in this case it is avoided by express enactment. A purchaser, therefore, from an equitable tenant in tail of copyholds should not part with his money until such an entry is duly made.

5. But the enrolment required of deeds as to free-

(*e*) Sec. 53.

(*f*) *Id.*

holds does not apply to deeds or surrenders of copyholds (*g*).

6. It has been observed by a learned writer that it does not seem quite clear upon the construction of the words in section 53 whether an equitable tenant in tail who has also a *legal* reversion is within this clause. The expression ought to have been, "whose estate *tail* shall be merely an estate in equity" (*h*). The proposed words would have prevented any doubt; but still it should seem that the case put would fall within this section; for the 51st section applying the general provisions to copyholds, enacts that a disposition by a tenant in tail thereof whose *estate* [tail] shall be an estate [tail] at law shall be made by surrender, and that a disposition by a tenant in tail thereof whose estate [tail] shall be merely an estate [tail] in equity, may be made by surrender or by deed. In this clause plainly the word "tail" is implied in the several places in which it is introduced above in crotchets: when therefore section 53 provides that a tenant in tail of copyhold lands whose *estate* shall be merely an estate in equity, may dispose of the land by deed, the context of both clauses shows that the legislature meant "whose estate [tail] shall be merely an estate in equity." A contrary construction would lead to much confusion.

(*g*) Sec. 54; sec. 75 authorises the Courts of Chancery in England and Ireland to fix the fees for enrolment of deeds, and for searches and examined copies; and s. 76 authorises the Court of Common Pleas to regulate the fees for entries

of deeds and endorsements, and for taking consents and surrenders, and for entries thereof on the court rolls of manors.

(*h*) Browell on Real Property Stat. 105, n. (*q*).

SECTION VI.

OF BANKRUPTS.

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| <ol style="list-style-type: none"> 1. <i>Extent of repeal of former acts.</i> 2. <i>Power of commissioners over estates tail and base fees.</i> 3. <i>Consent of protector.</i> 4. <i>Enrolment and entry of deeds of consent.</i> 5. <i>Base fee in purchaser enlarged by act.</i> 6. <i>Voidable estate in purchaser confirmed by disposition by commissioner.</i> 7. <i>Saving of right of purchaser without express notice.</i> | <ol style="list-style-type: none"> 8. <i>Bankrupt's power over his surplus estate.</i> 9. <i>Disposition by commissioner valid although bankrupt dead.</i> 10. <i>Disposition of copyholds (not merely an equity) to operate as a surrender.</i> 11. <i>Assignees to receive rents and enforce covenants until a disposition.</i> 12. <i>New act of bankruptcy adopts these provisions.</i> |
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1. THE former acts are repealed as to estates tail, but not as to any bankrupt under any commission or fiat on or before 31 December 1833 (*a*).

2. The commissioner under any fiat issued after that day against any bankrupt who at the time of issuing the fiat, or at any time afterwards before he has obtained his certificate, shall be an actual tenant in tail of lands of any tenure (*b*), is enabled by deed to dispose of the estate to a purchaser for valuable consideration, just as the bankrupt could have done, according as the protector, if there be one, consents or not (*c*). And a like power is given to the commissioner over a base fee (*d*).

(*a*) Sec. 55.

(*c*) Sec. 56.

(*b*) Which of course includes customary freeholds.

(*d*) Sec. 57.

3. And as regards the operation of a consent by the protector upon a disposition by the commissioner, he, the commissioner,—whether he shall have made a prior disposition without the consent of such protector or not, or whether a prior sale or conveyance shall have been made or not under the two former statutes relating to bankruptcy, or any future statute,—is placed in the same situation as the bankrupt himself would have occupied, and the previous directions in regard to the consent of the protector to the disposition of a tenant in tail of lands not held by copy of court roll, and in regard to the time and manner of giving such consent, and in regard to the enrolment of the deed of consent, where such deed is distinct from the assurance of the commissioner, is (except as far as it is varied by the next clause) to apply to every consent that may be given by virtue of the present clause (*e*).

4. It is then provided that the deed, if not relating to copyholds, shall be void if not enrolled in the Court of Chancery within six calendar months after its execution, and deeds of disposition and consent as to copyholds are to be entered on the court rolls, and to be endorsed and the entry testified as before directed (*f*).

5. There is an important provision relating to a purchaser of lands of any tenure of which the bankrupt shall be actual tenant in tail obtaining by a disposition from the commissioner *under this act* a base fee only, for want of a consent by the protector, in which case, if at any time afterwards, *during the continuance of the base fee*, there shall cease to be a pro-

tector, then the base fee will, without any further act, become enlarged in the hands of the purchaser into the same estate into which the same could have been enlarged under the act if there had been no protector when the disposition was made (*g*). And a like provision when a tenant in tail entitled to a base fee in lands of any tenure shall be adjudged a bankrupt at the time when there shall be a protector of the settlement by which the estate tail converted into a base fee was created, and the lands are sold under the old or any future bankrupt acts; in which case, if at any time afterwards, *during the continuance of the base fee*, there shall cease to be a protector, then the base fee will immediately be enlarged into the same estate into which it could have been enlarged under this act if at the time of the adjudication there had been no such protector, and the commissioner had disposed of the land under the act (*h*). The latter of these provisions requires some explanation; the former speaks for itself. Under the old bankrupt acts, the commissioners could not, even with the concurrence of the freeholder, acquire more than a base fee in an estate of which the bankrupt was tenant in tail in remainder, and even a joint commission against the tenant for life and the remainder-man in tail did not bar the remainders over (*i*); so that the commissioners had not as large a power over the estate as the bankrupt had. This power, as we have seen, is now conferred on the commissioner. And the object of the 61st section is—where a bankrupt is already entitled to a base fee, and would have been actual tenant in tail if the base fee had not been created, and there shall at the time be a protector of the settlement by

(*g*) Sec. 60.

(*h*) Sec. 61.

(*i*) Jervis v. Tayleur, 5 Barn. & Ald. 557.

which the estate tail converted into the base fee was created, and the lands are sold or conveyed under the existing or any future bankrupt acts—to enlarge the base fee if there should cease to be a protector during its continuance. This clause therefore provides for a case of an existing base fee in the bankrupt at the time of the bankruptcy, which is simply transferred, but not enlarged, under the bankrupt acts (*k*). The then existing act (6 Geo. 4, c. 16) was not repealed as to commissions or fiats before the 31st December 1833, and under that law the remainders could not have been barred, as we have seen, although the freeholder had concurred.

6. And where an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure has created, or shall create, a voidable estate in favour of a purchaser for valuable consideration, any disposition under the act by the commissioner (whether he has made under the act a previous disposition or not, or whether a prior sale or conveyance shall have been made or not under the bankrupt acts,) according as the protector consents or not, is to have the effect of confirming such voidable estate to its fullest extent (except those rights which are saved by the act), or as far as it could have been confirmed without the protector's consent (as the case may be). And a subsequent failure of a protector during the continuance of the base fee, where that only passes, will enlarge it.

7. But this last provision is clogged with the proviso, that if the disposition by the commissioner shall be made to a purchaser for valuable consideration, who shall not have *express notice* of the voidable estate,

(*k*) See sec. 55 : sec. 61 appears to be prospective only.

then the voidable estate shall not be confirmed against such purchaser (*l*).

8. The acts of the bankrupt tenant in tail are avoided against any disposition under the act to the same extent as if he were tenant in fee (*m*); but, subject to all the powers and the estate of the assignees, the bankrupt's own power of disposition under the act is to remain (*n*).

9. The disposition by the commissioner of lands of any tenure under a fiat where the bankrupt was, or before obtaining his certificate becomes an actual tenant in tail of such lands, or a tenant in tail entitled to a base fee in such lands, is made valid, although the bankrupt be dead at the time of the disposition, in the following cases; viz.

I. In case at the death there shall be no protector:

II. Or in case the bankrupt had been an actual tenant in tail, and there shall at the time of such disposition be issue inheritable to the estate tail, and either no protector, or a protector who shall consent to the disposition, or a protector who shall not consent:

III. Or in case the bankrupt had been a tenant in tail entitled to a base fee, and there shall at the time of the disposition be any issue, who, if the base fee had not been created, would have been actual tenant in tail, and either no protector, or a protector who shall consent to the disposition (*o*).

10. Every disposition by a commissioner of copyholds in which the estate of the bankrupt in the lands is not merely an estate in equity (*I*), is to operate as (*l*) Sec. 62; vide *supra*, p. 232. (*m*) Sec. 63. (*n*) Sec. 64. (*o*) Sec. 65.

(I) A mere equity in copyholds (not being an estate tail) may be disposed of by the assignees without having recourse to the powers of this act.

if such lands had been actually surrendered and the person to whom they may have been disposed of may claim to be admitted tenant thereto, and upon admittance is to pay the fines, fees, and other dues, as if the lands had passed by surrender (*p*).

11. Until a disposition by a commissioner under the act, the assignees are to receive the rents and to enforce the covenants (for which purposes full powers are given to them), as regards all copyhold lands, and also those lands of any other tenure which any commissioner has power to dispose of under the act after the bankrupt's death (*q*).

12. With the exception of section 55 of the act, repealing *pro tanto* the old bankrupt acts, all the sections considered under this head,—section 56 to section 69, both inclusive,—are engrafted into the new bankruptcy act (*r*) by way of reference, and rendered as operative as if they were re-enacted and extended to the proceedings under the new act. The provisions of the act in favour of creditors of bankrupts after the 31st of December 1833, and for the confirmation, in consequence of bankruptcy, of voidable estates created by them, extend to lands of any tenure in Ireland, saving the rights of the Crown to any reversion or remainder in the Crown in lands in Ireland; but deeds of disposition and consent are to be enrolled in the Court of Chancery in Ireland (*s*).

(*p*) Sec. 66.

(*r*) 12 & 13 Vict. c. 106, s. 208; for further provisions as to bankrupts, see s. 7, *post*; Sugd. Conc. View, 575.

(*q*) Sec. 67.

(*s*) Sections 68, 69 of 3 & 4 Will. 4, c. 74; for fees of office, see ss. 75, 76, and n. to pl. 5, sec. 5, *supra*.

SECTION VII.

OF MONEY ENTAILED: AND OF DISPOSITIONS BY MARRIED
WOMEN.

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| <ol style="list-style-type: none"> 1. <i>Lands to be sold or the money considered as land purchased.</i> 2. <i>Extended to lands in Ireland.</i> 3. <i>Acknowledgment unnecessary of deeds to be enrolled.</i> 4. <i>New bankrupt act.</i> 5. <i>Power of married woman, not being tenant in tail, to dispose by deed.</i> 6. <i>Power of married woman to dispose of reversionary interest in money charged on land or land-money: Hobby v. Allen.</i> 7. <i>May release right of dower.</i> 8. <i>Powers in feme covert not interfered with: how her deeds are to be executed, &c.</i> | <ol style="list-style-type: none"> 9. <i>Surrender of copyholds by husband and wife of equitable estate valid.</i> 10. <i>Power to dispense with husband's concurrence.</i> 11. <i>Wife authorised to convey copyholds given to her separate use where husband living abroad with another woman.</i> 12. <i>Married woman cannot be compelled to convey under decree for sale.</i> 13. <i>Enrolment of deeds executed by her as tenant in tail, protector, or owner: separate examination.</i> 14. <i>She may disclaim by deed.</i> |
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1. WHERE a man would be tenant in tail of lands directed to be purchased, if the money is to be produced by the sale of other lands, freehold or leasehold, or of any other tenure, those lands, and, if not, the money, are to be treated as the lands to be purchased; and if the lands directed to be sold are not copyhold, the previous clauses in the act, so far as circumstances will admit, are to apply as if the lands directed to be purchased were to be freehold, and were actually purchased and settled; and where the lands directed to be

sold are copyhold, the provisions are to apply as if the lands to be purchased were to be copyhold, and were actually purchased and settled; and in the case of money, as if the same were to be laid out in the purchase of freehold, and they were actually purchased and settled: but leaseholds for years and money are to be treated as personal estate as to the person in whose favour the disposition is made (*a*). And except in case of bankruptcy, the assurance by which the disposition of such leasehold lands or money shall be affected is to be an assignment by deed, which will have no operation unless enrolled in the Court of Chancery within six calendar months after the execution thereof; and in every case of bankruptcy the disposition of such leasehold lands or money is to be made by the commissioner, and completed by enrolment, in the same manner as before required in regard to lands not held by copy of court roll (*b*).

2. The above provision is extended to lands in Ireland to be sold, where the money arising from the sale is subject to be invested in the purchase of lands to be settled, so that the bankrupt, if the lands were purchased, would have an estate tail therein, and also to money under the control of equity in Ireland, or vested in trustees in Ireland, to be laid out in like manner. Deeds relating to lands in Ireland are to be enrolled in the Court of Chancery there; but deeds in regard to money are to be enrolled in the Court of Chancery in England, in both cases within six months after their execution. The rights of the Crown are saved to any reversion or remainder in lands in Ireland to be sold (*c*).

(*a*) Sec. 71; in the matter of
Smythe, 3 Myl. & Kee. 249.

(*b*) Sec. 71.

(*c*) Sec. 72.

The act does not extend to Ireland except where the same is expressly mentioned (*d*).

3. Acknowledgment of deeds before enrolment is not necessary as to deeds required to be enrolled in the Court of Chancery of England or Ireland (*e*).

4. The provisions which we have just stated in sections 71, 72 and 73 of the act are by the late bankrupt act, in addition to those before pointed out (*f*) engrafted into the new bankruptcy act (*g*) by way of reference, and rendered as operative as if they were re-enacted and extended to the proceedings under the new act.

5. The act then (*h*) contains a provision of great importance. Every married woman not being tenant in tail, is enabled by deed to dispose of lands of any tenure, and money subject to be invested in lands, and also to dispose of, release, surrender or extinguish any estate which she alone, or she and her husband in her right, may have in lands of any tenure, or in any such money; and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or in any such money, as effectually as if she were a *feme sole*; but her husband must concur in the deed, and the deed must be acknowledged in the manner required by the act, and the provision is not to extend to copyholds in cases where the power is not required.

(*d*) Sec. 92. The 7 Geo. 4, c. 45, is repealed, except as to proceedings commenced before 1st January 1834; s. 70. and see 12 & 13 Vict. c. 109, ss. 17, 18.

(*f*) Sec. 6, pl. 12, *supra*.

(*g*) 12 & 13 Vict. c. 106, s. 208.

(*e*) Sec. 73; see 4 & 5 Will. 4, c. 92, Ir., s. 73; *post*, s. 3, pl. 2; 226.

(*h*) Sec. 77; see 5 Bing. N. C.

6. In the late case of *Hobby v. Allen* (i) estates were settled in trustees in fee, in trust for *A.* for life, and after her decease to raise a sum of money and pay it to *B.*, on her attaining twenty-one, and with trusts for other persons. The settlement contained a power of sale, with the consent of the tenant for life; and the trustees were to invest the purchase monies in the purchase of other estates, to be settled in like manner. The estates were sold under the power for 1,250*l.* *B.*, the legatee, attained twenty-one in 1843, and in 1845 married, and by an order in the cause (I) 500*l.*, part of the purchase money, was paid into Court and invested in consols. By a deed in 1851, *A.*, the tenant for life, and *B.*, the legatee, and her husband, and the other parties interested, assigned the stock to trustees freed from the direction to lay it out in land upon certain trusts, and *B.* and her husband executed and acknowledged the deed according to the act. Vice-Chancellor Knight Bruce, upon an application by all parties to have the money paid out of court, observed that the object of the petition was the reversionary interest of a married woman in a sum of money charged on land. He thought that the married woman could do no act to affect such an interest during the life of the tenant for life. This did not come new upon him: it was a point upon which his mind had long been made up.

This construction of the act seems open to much doubt. As the legacy was not raisable as against the other persons interested in the estate until the death

(i) 20 Law J., 199.

(I) The dates of the sale and of the order are not stated, nor are the terms of the order stated.

of the tenant for life, the 500*l.* still remained part of the trust fund liable under the trusts of the settlement to be invested in lands; and in that view, *B.* and her husband had, it should seem, full power under the acts (*j*) to dispose of her reversionary interest in the legacy payable out of the real estate. For the 1st section of the act, which we are considering, gives to the word lands a general meaning, and to the word estate a meaning which extends to an estate in equity as well as at law, and also to any interest, charge, lien, or incumbrance in, upon, or affecting lands, either at law or in equity, and also extends to any interest, charge, lien, or incumbrance in, upon, or affecting money subject to be invested in the purchase of lands. And, as we have seen, the 77th section enables a married woman by deed to dispose of, release, surrender, or extinguish any estate which she and her husband in her right have in lands of any tenure, or in any money subject to be invested in lands. These provisions, without calling in aid the later act, seem clearly to enable a married woman and her husband to dispose of her reversionary interest in money, subject, like that in *Hobby v. Allen*, to be invested in land. And even if the estate had remained unsold, it would seem that the act would have enabled the legatee and her husband during the life of the tenant for life, to dispose of, release, or extinguish her reversionary interest in the legacy charged on the land. It would be a different question, where the legacy having been raised, has become property severed from the general trust fund, and forms a separate personal fund altogether discharged from its character as a charge upon real estate.

(*j*) 3 & 4 Will. 4, c. 74, ss. 1, 77; 8 & 9 Vict. c. 106, s. 6; *supra*, s. 7, pl. 13.

7. The dower act (*i*) does not prevent a married woman, with the concurrence of her husband, from barring her dower; but this statute has abolished the only modes by which that could have been accomplished. In framing the present section, the right of dower is not scientifically provided for, but the intention is obvious, and the married woman is empowered to extinguish any estate which she has in lands; and the word estate is, by the first section, extended to any interest in lands, and a power therefore does appear to be given to married women and their husbands to bar dower. This question, of course, could only arise in regard to women married before the 1st of January 1834, and whose rights to dower are saved by the dower act.

8. The act does not interfere with any power in a married woman, unless she suspends or extinguishes it by a disposition under the act (*k*). But every deed executed by her, except in the mere character of a protector, for the sole purpose of giving her consent to the disposition by a tenant in tail, is to be acknowledged by her (*l*), and she is to be separately examined as to her consent, and as to her being of age and of competent understanding (*m*), for which purpose necessary machinery is provided by the acts (*n*) (I). When

(*i*) See *infra*, ch. 3.

In re Harper, 6 Mann. & Gran.

(*k*) Sec. 78.

732.

(*l*) Sec. 79; see an acknowledgment by a deaf and dumb woman;

(*m*) Sections 80, 84.

(*n*) Sections 81—89.

(I) Sec. 89 enables the Court of Common Pleas to make orders touching the examination and other matters, and this power has been extensively exercised: the rules are inserted in 10 Bing. 458; 1 Bing. N. C. 242. The cases and practice on acknowledgments by married women are collected in Shelford on Statutes, 376, n.; and see 2 Hayes' Com. 237.

the certificate of the acknowledgment of a deed by a married woman is filed as directed by the act, the deed so acknowledged, so far as regards the disposition, release, surrender, or extinguishment thereby made by her, is to take effect from the time of its being acknowledged; and the subsequent filing of such certificate is to have relation to such acknowledgment (*o*).

9. Surrenders by husband and wife, upon which she is separately examined, of equitable estates in copyholds, are made as binding upon the woman as surrenders of legal estates, and all former surrenders of the like kind are thereby rendered valid (*p*).

10. And the Court of Common Pleas is authorised to dispense with the husband's concurrence, where, in consequence of his being a lunatic, idiot, or of unsound mind, and whether found such by inquisition or not, or from any other cause, he shall be incapable of executing a deed, or of making a surrender of copyhold lands; or where his residence is not known, or he shall be in prison, or live apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being transported, or from any other cause whatever; but this is to be without prejudice to his rights as then existing, independently of the act (*q*). But this clause is not to apply to the case of a married woman where, under the act, the Chancellor or the Court of Chancery shall be the protector of the settlement in lieu of her husband (*r*).

11. Where a married woman was devisee of copyholds for her separate use, and her husband had been living abroad for many years with another woman, the

(*o*) Sec. 86. (*p*) Sec. 90. (*q*) Sec. 91. (*r*) See 1 Phill. 260.

Court made an order sanctioning her conveyance without the concurrence of her husband (*s*).

12. But it has been decided that the powers conferred on a married woman are only enabling ones, and do not authorise the Court of Chancery to compel her to join in a conveyance to give effect to a sale under a decree, although it was at the suit of an equitable mortgagee, by deposit of deeds by herself when sole, she being at the time mortgagee in fee of the estate (*t*).

13. It should be kept in view, that a statute deed by a married woman, as tenant in tail or protector of a settlement, must be enrolled according to the directions of the act; and where it operates as a conveyance of her interests, it must be acknowledged by her, and she must be separately examined whether she is tenant in tail or not.

14. A later act (*u*), which enables the disposition by deed of contingent interests, possibilities coupled with an interest, and rights of entry, provides that no such disposition shall, by force only of that act, defeat or enlarge an estate tail, and that every such disposition by a married woman shall be made conformably to the provisions just referred to in the principal statute; and it is provided (*x*) that after the 1st October 1845, an estate or interest in hereditaments of any

(*s*) *Ex parte* Ann Shirley, 5 Bing. N. C. 226; and see the cases collected in Shelford on Statutes, 384, n.

(*t*) *Jordan v. Jones*, 2 Phill. 170, reversing the order of Wigram, V. C., on the authority of *Foxon v.*

Foxon, 1836; see now and consider 13 & 14 Vict. c. 60, ss. 1, 30; *post*, ch. 8.

(*u*) 8 & 9 Vict. c. 106, s. 6; see 7 & 8 Vict. c. 76, s. 5.

(*x*) Sec. 7 of 8 & 9 Vict.

tenure in England may be disclaimed by a married woman by deed, such disclaimer to be made conformably to the above-mentioned provisions.

SECTION VIII.

OF ENROLMENT AND ACKNOWLEDGMENT OF DEEDS, AND OF
CONFIRMING A PURCHASER'S VOIDABLE ESTATE.

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| 1. <i>Acknowledgment unnecessary.</i> | 3. <i>Conflicting rights of purchasers :
operation of express notice.</i> |
| 2. <i>Operation of enrolment.</i> | 4. <i>Policy and frame of the act.</i> |
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1. ALTHOUGH deeds are required to be enrolled in the Court of Chancery, yet previous acknowledgment, as we have seen, is rendered unnecessary (*a*).

2. Every deed required to be enrolled in either of the Courts of Chancery, by which lands or money are to be disposed of under the act, is, when enrolled, to operate as if enrolment had not been required, with this important exception, that every such deed will be void against any person claiming the lands or money, or any part thereof, under any subsequent deed duly enrolled under the act, if such subsequent deed shall be first enrolled (*b*). And here again the act is silent as to notice, and this appears to be a general provision,

(*a*) Sec. 73 ; see 4 & 5 Will. 4, c. 92, s. 65 (the Irish act), which confines *that* exemption to Ireland : and see s. 66, *ib*.

(*b*) Sec. 74.

under which, according to the terms of it, a man knowing that the estate had been sold or mortgaged, but that the deed was not enrolled, might with impunity himself buy the estate, and by procuring his deed to be first enrolled, defeat the *bonâ fide* prior purchaser. This is not like the case of the deed operating upon an equitable estate tail in a copyhold, to which we have before adverted (*b*), because that deed wholly depends for its operation on the statute; whereas in this case, the conveyance by the tenant in tail, by [lease and] release for example, although not enrolled, would not have been void before the statute against a subsequent purchaser, whether he bought with or without notice, and it could therefore hardly have been the intention of the legislature to avoid such a deed against a purchaser who bought with express notice of the prior deed, although he procured his deed to be first enrolled.

3. But the conflicting rights of purchasers in such a case seem to depend upon another provision (*c*), by which a voidable estate, whenever created by a tenant in tail in favour of a purchaser for valuable consideration, will be confirmed by a subsequent valid disposition under the act, unless that disposition be in favour of a purchaser for valuable consideration, who bought *without express notice of the voidable estate*. Now where there is a valid conveyance by a tenant in tail to a purchaser, although it may be ineffectual as a disposition under the act,—because, for example, it was not enrolled in due time,—yet it would pass a base fee to the purchaser without the aid of the statute, although

(*b*) Vide *supra*, p. 232, 235.

(*c*) Sec. 38.

voidable by the issue in tail. If, therefore, the tenant in tail in such a case were afterwards to make a valid disposition under the act, that would operate as a confirmation of the previous voidable estate under section 38, unless the latter conveyance was in favour of a purchaser who bought without express notice of the former conveyance. This seems, therefore, to embrace the very case provided for by section 74, for the estate is voidable for want of the deeds being enrolled; and that voidable estate will be confirmed by the subsequent disposition, where, as we suppose, the last purchaser bought with express notice of the voidable estate. This construction does no violence to the words of the statute, but merely brings in aid the 38th section to the explanation of the 74th. The result is, that where one purchaser claims under a prior, but, as far as the act is concerned, an ineffectual disposition, and another claims under a later but effectual disposition under the act, the former will be preferred to the latter, if the latter bought with express notice of the other's right, unless the 74th section is not to be controlled or explained by the 38th; and if not, then the particular case of want of enrolment does not fall within the 38th section, but is altogether dependent upon the 74th; and the want of enrolment is fatal where there is a subsequent purchaser's deed first enrolled, although he purchased with express notice; but it should always be kept in view that section 74 is silent as to notice.

4. The sweeping away of fines and recoveries is a solid improvement in the law, and the act of parliament is a masterly performance, and reflects great credit on the learned conveyancer by whom it was

framed (I). But the policy of the provisions in the act may be doubted. All men's titles must for many years depend upon the law of fines and recoveries, and few will be found in a short time competent to judge of their validity. The substitute for the old law is one of vast complication, introducing a protector in every settlement to check the alienation by tenant in tail in remainder. Whilst we brush away our old books, no one can doubt that the new system, from its complication, will lay the foundation for new ones, and that the construction of the act in every given case will not be settled but after a long run of litigation, although no doubt, at first, everything will proceed smoothly. The Author was one of those who thought that the law would have been more simple if it had merely abolished fines and recoveries, and made deeds to declare the use of fines, and to make tenants to the *præcipe* in recoveries effectual without actually levying a fine or suffering a recovery.

(I) The writer cannot refrain from observing that his admiration of Mr. Brodie's performance has been increased by the attentive consideration which he has now been compelled to bestow upon it.

SECTION IX.

OF THE ACT RELATING TO IRELAND.

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| 1. <i>Operates, from what period.</i>
3. <i>Extends to contingent interests.</i>
4. <i>Rights of Crown partially saved in English act.</i>
5. <i>To what extent saved in Irish act.</i> | 6. <i>The like in bankruptcy and money entailed.</i>
8. <i>Confirmation of voidable estate.</i>
9. <i>Married woman's power.</i>
11. <i>General power to convey contingent interests.</i>
12. <i>Confined to Ireland, semble.</i> |
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1. THE provisions already referred to were embodied in an act to operate in Ireland, which provisions, although not all accurately confined to Ireland, would, upon the context, it is apprehended, be so confined, unless where expressly extended to England (*a*).

2. The date of the 31st day of December 1833, in the English act, upon which so much depends, has, in the act for Ireland, the date of the 31st day of October 1834 substituted for it.

3. The explanatory clause in the beginning of the act, in affixing a meaning to the word estate, says that it shall extend to an estate in equity as well as at law, and shall also extend to an interest, charge, *right, title, lien or incumbrance, in, upon, to, or affecting lands, either at law or in equity, whether present or vested, future or contingent.* The words in italics are not in the English act, and appear to have been introduced into the Irish act without sufficient consideration.

(*a*) 4 & 5 Will. 4, c. 92 (15th August 1834); see *supra*, s. 7, pl. 2.

They may give rise to important questions upon the office of a protector by estate, and may operate contrary to the general policy of the act: they, however, prevent any question as to a married woman's power, with her husband, to bar her dower. In section 20 of the English act, which declares that it does not enable issue in tail to dispose of his expectancies, the words are "expectant interest," whilst in the Irish act the words are "expectant interest or possibility" (*b*).

4. By the English act, a tenant in tail is enabled to bar the Crown; but by s. 18 of that act it is provided that the power shall not extend to tenants of estates tail who by the 34 & 35 H. 8, c. 20, or by any other act, are restrained from barring their estates tail.

5. But by the Irish act, the power of every actual tenant in tail is to operate as against all persons whose estates are to take effect after the determination or in defeasance of such estate tail, including the King, his heirs and successors, as regards the title of his Majesty to any reversion or remainder created or reserved by any settlement or will, and which reversion or remainder should have come, or should thereafter come to the Crown, in consequence of the attainder of any person to whom the forfeited reversion or remainder was previously to such forfeiture limited by any settlement or will, but not in any other case, or where the title of the Crown should have accrued by any other means (*c*). And the power of every tenant in tail, where a base fee has been created, is made equally extensive (*d*); but it is provided that nothing in the act contained should

(*b*) Sec. 17; see 7 & 8 Vict. c. 76, s. 5; 8 & 9 Vict. c. 106, s. 6; and see s. 2, *supra*, pl. 18.

(*c*) Sec. 12.

(*d*) Sec. 16.

authorise any tenant in tail or other person to defeat or bar any estate or interest which might, at the time of passing the act, have been granted to any person or persons by his Majesty or any of his predecessors in any reversion or remainder which might have come to the Crown by attainder or otherwise.

6. The English act extends its provisions in regard to bankrupts—including the confirmation of voidable estates—to lands in Ireland, but contains a *general* saving of the rights of the Crown to *any* reversion or remainder in the Crown in lands in Ireland (*e*). This is not consistent with the Irish act. The Irish act contains a similar provision, extending its powers as to bankrupts, including the confirmation of voidable estates, to lands in England, but without any saving of the rights of the Crown, which, however, is supplied by the body of the act, which, like the English act, gives to the commissioner the same power as the tenant in tail has (*f*). This does not seem to be consistent with the English act; and the like observations apply to the reciprocal provisions in the several acts, in regard to entailed money (*g*).

7. Since the Irish act passed, an unsuccessful attempt has been made to induce the legislature to alter these provisions in favour of the subject.

8. The section in the Irish act (*h*), which makes a subsequent disposition by tenant in tail a confirmation of a previously avoidable estate, adds this proviso: that if such disposition shall be made to a purchaser for

(*e*) Sec. 68, 3 & 4 Will. 4, c. 74.

(*f*) Sec. 60, 4 & 5 Will. 4, c. 92; but deeds of disposition and consent as to lands in England are to be

enrolled in the Court of Chancery in England, s. 61.

(*g*) Sec. 72, 3 & 4 Will. 4, c. 74; sec. 64, 4 & 5 Will. 4, c. 92.

(*h*) Sec. 36.

valuable consideration, who shall not have express notice of the voidable estate, *and if the deed or instrument creating such voidable estate shall not have been registered previous to such disposition*, then the voidable estate shall not be confirmed as against such purchaser, and the persons claiming under him. The words in italics are not in the English act. The clause has been altered in rather a singular manner, but the effect of it is to make registry equipollent to the express notice required by the English act, and also by the act for Ireland. And the like addition is made to the section which makes a disposition by a commissioner under bankruptcy a confirmation of a previous voidable estate (*i*).

9. The clause giving a power of disposition to a married woman has the additional word *disclaim* introduced into it (*k*); and the proviso, that the powers of disposition given by the act shall not interfere with any other powers she may have, has these additional words annexed to it; viz. but such powers of disposition shall not enable a married woman to dispose of lands or any estate therein, where the settlement or other instrument under which she may be entitled to the same, shall contain a valid restriction against the anticipation thereof by such married woman.

10. The act for Ireland has, of course, many verbal alterations, and references to the Irish in lieu of the English statutes, to which we need not refer, and it properly omits all the clauses in the English act referring to ancient demesne and copyholds. But it contains, in addition to the provisions of the English act,

(*i*) Sec. 55.

(*l*) Sec. 68, 4 & 5 Will. 4, c. 92; c. 106, s. 7, *supra*, s. 7, of this see now, as to England, 8 & 9 Vict. work, pl. 13.

the following enactment (*l*), which has since been extended, in different words, to England (*m*).

11. The clause to which I refer (*n*) enacts, that after the 31st day of October 1834, it shall be lawful for any person, either before or after he shall become entitled in any manner, except as expectant heir of the body of a living person, to an estate in lands not being a vested estate, and whether he be or be not ascertained as the person or one of the persons in whom the same may become vested, to dispose of such lands for the whole or any part of such estate therein, by any assurance, whether deed, will, or any other instrument by which he could have made such disposition, if such estate were a vested estate in possession; but it is provided that no such disposition shall be valid or have any effect where the person making the same shall not at the time of the disposition have become entitled to such estate, unless the deed, will, or other instrument by virtue of which he may become entitled, be existing and in operation at the time of the disposition.

12. The English act properly contains an enactment that it shall not extend to Ireland except where the same is expressly mentioned (*o*). But a corresponding clause is not inserted, as it ought to have been, in the Irish act, and the enactment as to contingent interests just quoted, like many other of the provisions, is not in terms confined to Ireland; but having regard to the context, this provision, like the rest, would no doubt be held not to extend to England.

(*l*) See Hayes' Convey. 195; in which work the new statutes are elaborately discussed.

(*n*) Sec. 22.

(*m*) 8 & 9 Vict. c. 106, s. 6, *supra*, s. 7, pl. 13. Compare the provisions.

(*o*) Sec. 92; see in the matter of Graydon, 1 Mac. & Gor. 655.

CHAPTER III.

OF DOWER.

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| 1. <i>Dower barred by legal term.</i> | 13. <i>Husband's power over dower by disposition.</i> |
| 2. <i>Dower of wife of trustee or mortgagee.</i> | 15. <i>By charge or contract.</i> |
| 3. <i>Eviction of jointure.</i> | 16. <i>By declaration in the conveyance, or by deed.</i> |
| 4. <i>Equitable jointure.</i> | 17. <i>By his will.</i> |
| 5. <i>Bar of dower no bar of thirds.</i> | 20. <i>Wife barred by devise to her of any dowerable land.</i> |
| 6. <i>Infants.</i> | 21. <i>But not by personal estate, or of land not liable to dower.</i> |
| 7. <i>Equitable jointure on infant.</i> | 22. <i>Covenants not to bar dower binding in equity.</i> |
| 10. <i>Exceptions out of new dower act.</i> | 23. <i>Purchaser's inquiry.</i> |
| 11. <i>Upon purchases, dower of purchaser's wife should not be barred without instructions.</i> | 24. <i>Curtesy.</i> |
| 12. <i>New right of dower.</i> | |
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I. Of Dower before the late Act.

1. IT is clear that a woman is barred of her dower, both at law and in equity, by a legal term created previously to her right of dower attaching on the estate, of which an assignment has been obtained by a purchaser to attend the inheritance (*a*). For although she can recover her dower at law, it will be with a *cesset executio* during the term, and equity will not remove the bar. But notwithstanding that a purchaser could obtain an assignment of an outstanding term, which would bar the vendor's wife of her dower, a fine was

(*a*) Vide *infra*, ch. 15; see now 8 & 9 Vict. c. 112, *infra*, ch. 5.

always required from the vendor and his wife at his expense. It was however decided that a court of equity would compel a purchaser to accept the title without a fine (*b*). This doctrine will not apply to cases within the late act, because the conveyance alone will bar the wife's right to dower.

2. The wife of a trustee in fee, or of a mortgagee in fee of a forfeited mortgage, is at law entitled to dower; but a fine was on that account never required by a purchaser; because, if the wife of a trustee or a mortgagee were to be so ill advised as to prosecute her legal claim, equity would, at this day, undoubtedly saddle her with all the costs (*c*). The new act does not alter the law in this respect.

3. But as far as depends upon the old law, whether the jointure be legal or equitable, if the jointress is evicted, she may, it seems, claim her dower out of any real estate of which she would otherwise have been dowable. For it is by the statute of uses (*d*), by which jointures are made bars of dower, declared, that if any woman be lawfully evicted from jointure or any part thereof, without any fraud or covin, then she shall be endowed of as much of the residue of her husband's tenements or hereditaments, whereof she was before dowable, as the same lands and tenements so evicted shall amount to; and the point was expressly decided in Mansfield's case, which was adjudged in the 28th of Eliz. (*e*). There a jointure was conveyed to the

(*b*) See 10 Ves. 261, 262; 1 Jac. Pope, 2 Freem. 43, 71; Lloyd v. & Walk. 665; Jac. 490. Lloyd, 4 Dru. & War. 354.

(*c*) See Noel v. Jevon, Bevant v. (*d*) 27 Hen. 8, c. 10, s. 7.

(*e*) Harg. n. 8, Co, Litt. 33 a.

wife before the coverture, and during the coverture the husband purchased other lands and aliened them again and died: the land which the wife had in jointure was evicted, and the wife had dower of the lands which were purchased and aliened by the husband at the time when she was barred of her action of dower. This decided the point at law, and of course equity must in this respect follow the law (*f*). The Author's impression therefore was, that where an estate would have been subject to the dower of the vendor's wife, if she were not barred by a jointure, whether legal or equitable, the vendor was bound either to procure his wife to levy a fine of the estate at his own expense, or to produce a satisfactory title to the jointure lands. And this was no more than was constantly required where an estate had been taken in exchange. The vendor was compelled to produce the title, not only to the estate sold, but also to the estate given by him in exchange. The same principle applied to the case under consideration. But this is now material with reference only to cases *not* within the late act, for this question will not arise under the new act as regards purchasers, because every conveyance will bar the wife's dower, so that although evicted of her jointure, she could not claim her dower against a purchaser of other lands. A fine, we must remember, cannot now be levied; although a substitute for it is provided.

4. Equity appears to consider any provision, however inadequate or precarious it may be, which an adult previously to marriage accepts in lieu of dower, a good

(*f*) Gervoyes's case, Mo. 717, pl. 1002; and see 4 Co. 3 b.; 4 Bro. C. C. 506, n.; Mansfield's case, Harg. n. 81, Co. Litt. 33a.; Simpson v. Gutteridge, 1 Madd. 609.

equitable jointure (*g*); and will in some cases even *imply* an intention to bar the wife of her dower; thus, where a provision was made for the livelihood and maintenance of the wife after her husband's death, although it was not expressed to be in bar of dower, yet it was holden to be a bar in equity, on the implied intention of the parties (*h*). This rule may still operate.

5. But in a case where a leasehold estate was settled before marriage upon the intended wife, "in recompense, and bar of dower, and for a provision for her," and the husband had no real estate, it was held that the wife's right to thirds was not barred (*i*). For, as the declared object was to bar her of dower, no implication could be admitted, that she was to be barred of thirds also; the direction that the settlement was for a provision for her, only expressed the effect of the settlement, and could not be deemed evidence of an intention to bar her of a right which was not named. This of course is still law.

6. So, as infants are within the statute of Hen. 8 (*k*), and may be barred of dower at law, they may in like manner be barred by an equitable jointure; and the

(*g*) *Jordan v. Savage*, Bac. Abr. Jointure, (B) 5; *Charles v. Andrews*, 9 Mod. 152; *Williams v. Chitty*, 3 Ves. 545; 4 Bro. C. C. 513. This was admitted by the counsel for the appellants in *Drury v. Drury*; 5 Bro. P. C. 581; *in re Heron*, 3 Ir. Eq. Rep. 589; 1 Fla. & Kel. 330.

(*h*) *Vizard v. Longdale*, 3 Atk. 8, cited; reported 2 Kel. Cha. Ca. 17, nom. *Vizod v. Londen*. See 2 Com. Dig. 148; *Estcourt v. Estcourt*, 1

Cox, 20; *Tinny v. Tinny*, 3 Atk. 8; *Couch v. Stratton*, 4 Ves. 391; and *Garthshore v. Chalie*, 10 Ves. 20. See Sugd. n. (7) to *Gilb. on Uses*, p. 332.

(*i*) *Cresswell v. Byron*, 3 Bro. C. C. 362. See *Pickering v. Lord Stamford*, 3 Ves. 332.

(*k*) *Drury v. Drury*, or, *Earl of Bucks v. Drury*, 5 Bro. P. C. 570; 4 Bro. C. C. 506, n.; *Wilmot*, 177.

late act does not alter the law in this respect except so far as it authorises the husband alone to bar his wife's dower, whether an infant or an adult.

7. But under the old law an equitable provision in bar of dower will not bind an infant, unless it be as certain a provision as her dower. Therefore a settlement of an estate upon an infant for life, after the death of her husband *and any third person*, will not be a good bar, as the stranger may survive the wife (*l*). So a provision that the personal estate shall go according to the custom of London, in bar of dower, or any provision of that nature, will not be deemed an equitable bar of dower to an infant, on account of the uncertainty and precariousness of the provision (*m*).

8. In *Caruthers v. Caruthers* (*n*), Lord Alvanley, then Master of the Rolls, addressing himself to what was and what was not an equitable bar of dower to an infant, put the case of a charge in bar of dower made upon an estate with a bad title, and held that it would be no bar. Therefore, whatever opinion might be entertained on the general question, a purchaser formerly required to be satisfied of the title to the lands upon which the equitable jointure of a *feme covert* married under age was charged. And where the settlement rested in covenant, the purchaser could not safely complete his contract until the covenant was actually performed; for an alienation by the husband of the fund out of which the jointure was to arise, would have been deemed an eviction of the fund, and

(*l*) *Caruthers v. Caruthers*, 4 Bro. C. C. 500. See *Corbet v. Corbet*, 1 Sim. & Stu. 612, affirmed by Lord Chan. upon appeal.

(*m*) *Smith v. Smith*, 5 Ves. 189; 5 Russ. 254.

(*n*) 4 Bro. C. C. 500; see 5 Ves. 192.

consequently the wife would be let in for her dower (*o*).

9. But these points cannot affect a purchase within the operation of the late act, for the conveyance will bar the seller's wife of her dower without regard to the question whether she has any jointure or a valid binding one. And as a man can by his declaration alone bar his wife's right, any provision, however infirm, which is declared to be in bar of dower, will no doubt be held to do so, although the wife is an infant.

II. Of dower since the new act.

10. The foregoing observations apply to the law as it stood before the 3 & 4 Will. 4, c. 105. That act does not affect copyholds, as the freebench in them is generally subject to the husband's power of disposition, nor does it extend to the dower of any widow who married on or before the 1st January 1834, and it is not to give to any will, deed, contract, engagement, or charge executed, entered into, or created before that day, the effect of defeating or prejudicing any right to dower (*p*). It is, therefore, still necessary to know what the law is with reference to the cases to which the act does not extend. And it must be borne in mind, that as to widows within the exception, their rights are saved in estates acquired by their husbands, even after the 1st January 1834. This will render it necessary for a long period to come to guard, by the form of conveyances to purchasers who were married on or before the 1st January 1834, against dower in the old way, which may be effected so as to leave the

(*o*) *Drury v. Drury*, 4 Bro. C. C. 506, n. ; *Power v. Sheil*, 1 Moll. 296.

(*p*) Sec. 14.

fee in the purchaser if he survive his wife. As, on the one hand, the dower of a woman married on or before the day named cannot be affected by the new law; so, on the other, it seems clear that such a woman cannot claim the additional benefits in the shape of dower provided by the act.

11. It is usual, it seems, in *all* cases of conveyances to a purchaser, to insert a declaration depriving his wife of dower, even where there is a limitation to bar the dower of a wife married on or before the 1st January 1834, in order to provide against a future marriage; but this practice, without express instructions, seems not to be correct: it was quite correct to prevent dower from attaching, whilst the husband's power of disposition either by act *inter vivos* or by will was inoperative against his wife's dower; but now that he can charge, sell, convey, or devise his estate free from dower, or put an end to it by any deed, it would not be right, without the owner's authority, by a declaration in the conveyance to prevent dower altogether. Why should the wife's dower be guarded against any more than a descent to a distant unknown relative? Neither can take contrary to the owner's disposition. The real property commissioners, in their first report (*q*), state the true principle on which the law of dower is to be supported to be, that it is an interest which the law takes from the heir of a deceased proprietor for the support of his widow, whose claims in natural justice and policy appear to stand at least on an equal footing with the claims of the heir, and they thought that by combining this principle with that of a right of alienation inseparably incident to property of every

description, the law of dower might be put on a footing more beneficial on the whole to widows, and free from nearly all the then existing inconveniences and mischiefs. These considerations may induce conveyancers not as a matter of course to deprive a wife of her chance of dower. If the owner allow his estate to descend, the claim of the widow is equal to that of issue, and superior to that of a lineal ancestor or a distant relation (*r*).

12. The right of dower of women married after the 1st January 1834, is placed on altogether a different footing. It is enacted, that when a husband shall die, beneficially entitled to any land (*I*) for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint-tenancy), then his widow shall be entitled in equity to dower out of the same land (*s*), so that now dower attaches on an estate contracted for, unless it be otherwise provided by the husband, the purchaser. And dower attaches not only on equitable estates, but on estates partly legal and partly equitable, if the interest is equal to an estate of inheritance in possession. The common uses to bar dower therefore, viz. a power of appointment with, in default of appointment, a limita-

(*r*) See *infra*, pl. 20.

(*s*) Sec. 2; see *Lyster v. Mahony*, 1 Dru. & War. 236.

(1) The word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; sect. 1.

tion to a trustee for the owner's life, interposed between limitations to him for life and in fee, would not prevent a woman from being entitled to dower under the act, so far as the estate remains undisposed of by the husband, either by appointment or conveyance: the only question is, had he substantially an estate of inheritance in possession? But the *common form* declares, that the object of such limitations is to bar the wife of dower, and that declaration would effect that object, although the husband should die seised of the fee. The real property commissioners in respect of equitable estates only intended to make the wife's right to dower co-extensive with the husband's right to curtesy (I), and the act does not seem to have accomplished more.

13. And when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she is to be entitled to dower out of the same, although her husband shall not have recovered possession thereof; provided that such dower be sued for or obtained within the period during

(I) We propose that dower should attach upon all estates of inheritance in possession, excepting the species of property to which dower is not incident, and on property considered in equity as real estate, of or to which any husband dies seised or entitled in fact or in law, whether legally and beneficially, or beneficially only, which, if belonging to the wife, would be subject to the husband's curtesy, but subject, like the interest of other persons having partial interests in the inheritance, to any estates, charges or incumbrances which the husband may have lawfully created, or bound himself to create, and to his debts so far as they attach on his freehold estates; and as to estates which he can affect by his will, to any disposition, direction or declaration, made by his will, executed so as to affect freehold estate, and that dower should not attach on any other estate. By this enactment, the artificial distinction between legal and equitable estates will be taken away.

which such right of entry or action might be enforced (*t*).

14. The above are both provisions *extending* the wife's right to dower; but the other provisions place the right altogether in the power of the husband. For no widow will be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will (*u*).

15. And all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable, will be valid and effectual as against the right of his widow to dower (*x*), so that now a contract to sell an estate will bind the wife's right to dower, although her husband die before a conveyance is executed, and judgments against the husband would no doubt bind the wife.

16. And a widow will not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or by any deed executed by him, it is declared that his widow shall not be entitled to dower out of such land (*y*). (I.)

(*t*) Sec. 3.

(*u*) Sec. 4.

(*x*) Sec. 5.

(*y*) Sec. 6.

(I) There appears to have been no sufficient ground for the alteration of the law by this statute. The wife's ancient right of dower has been in effect taken away. And surely it is inconsistent, whilst you enable the husband in every case to defeat it, to extend the right over equitable estates. The first clause of the provision in section 6 was suggested by the Author, and was by the desire of Lord Eldon introduced into a bill for altering the statute of limitations, brought into the House of Commons by the present Vice-Chancellor when he was a member of that house. It was no infringement upon the right of the wife, for as the husband might have limited the estate to uses to bar dower, so as to prevent dower from attaching, there was no reason why his simple decla-

17. And a widow will not be entitled to dower out of any land of which her husband dies wholly or partially intestate when by the will of her husband, duly executed for the devise of freehold estates, he declares his intention that she shall not be entitled to dower out of such land, or out of any of his land (z).

18. And the right of a widow to dower will be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband, duly executed as aforesaid (a).

19. The act then proceeds to provide for the cases in which testamentary provisions by the husband for his wife shall be a bar of her dower :

20. Where a husband devises *any land* out of which his widow would be entitled to dower, if the same were not so devised, or *any estate or interest therein*, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will (b) ; so that any gift out of lands of which she would be dowable will bar her right in all his lands. If a man therefore, for example, were to purchase land, and were by the conveyance or by a separate deed to declare that his wife should not be dowable out of it, and were afterwards to devise the land, or any interest in it, to her, such devise would not exclude the wife's right of dower in any other land under this provision of the act. This affords an additional reason why a

(z) Sec. 7.

(a) Sec. 8.

(b) Sec. 9.

ration should not have the same operation, and the object was to prevent the unnecessary creation of powers. But the vesting of a power in the husband to defeat the wife's right after it has attached, must be defended upon different grounds : 2 Sugd. Purch. 276, 10th edit.

purchaser's wife should not be barred of dower by the conveyance to him (c).

21. But no gift or bequest made by any husband to or for the benefit of his widow, of or out of his personal estate, or of or out of any of his land not liable to dower, is to defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will (d).

22. And it is provided that nothing in the act contained shall prevent any court of equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands (e). Nor is anything in the act to interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies (f). Lastly, dower *ad ostium ecclesiæ*, and dower *ex assensu patris*, are abolished (g).

23. In purchasing an estate free from dower by force of the act, it should be ascertained that the seller has not bound himself by agreement not to bar his wife's dower.

24. The alterations suggested by the commissioners in the law of curtesy are mostly of an arbitrary description; and "as there is no very strong reason for altering it," the attempt to do so will probably not be renewed (h).

(c) *Supra*, pl. 11.

(d) Sec. 10.

(e) Sec. 11.

(f) Sec. 12.

(g) Sec. 13.

(h) R. P. C. 1 Rep. 19.

CHAPTER IV.

OF TITLE BY DESCENT: 4 & 5 W. 4, c. 106.

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| <p>1. } <i>Descent to be traced from the</i>
 19. } <i>purchaser.</i>
 2. <i>Actual seisin unnecessary.</i>
 3. <i>Descent to be proved to exclude</i>
 <i>title as purchaser.</i>
 4. <i>Son of illegitimate father.</i>
 5. <i>Heir though devisee to take by</i>
 <i>descent: grantor or his heirs</i>
 <i>also.</i>
 6. <i>The old law.</i>
 7. <i>Where purchaser's ancestor to</i>
 <i>be deemed the purchaser.</i>
 9. <i>Descent from brother or sister.</i>
 10. <i>Lineal ancestors heirs to issue.</i>
 11. <i>Male line before the female.</i></p> | <p>12. <i>Preference of mother of more re-</i>
 <i>mote male ancestor.</i>
 14. <i>Half blood admitted.</i>
 15. <i>Attainder not an impediment.</i>
 16. }
 17. } <i>Limit of act.</i>
 18. <i>Possessio fratris abolished.</i>
 21. <i>Canons of descent.</i>
 22. <i>Examination of pedigree.</i>
 23. <i>Where a son is the purchaser.</i>
 25. <i>Where the father is the pur-</i>
 <i>chaser.</i>
 26. <i>Estate of coparcener descends to</i>
 <i>her issue.</i></p> |
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THE provisions of the new law of descent may be arranged under the following heads: 1. Who is the first purchaser, and where a person takes by purchase; 2. Of descents between brothers and sisters, and to lineal ancestors; 3. Of the preference of males to females; 4. Of the half blood; 5. Of attainder; and lastly, when the act commences, and how it operates.

I. Then in regard to the first purchaser and taking by purchase,

1. The statute enacts, that in every case descent (I)

(I) Land.—The word “land” shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether

shall be traced *from the purchaser*; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the *person last entitled to the land* is, for the purposes of this act, to be considered to have been the purchaser thereof *unless it shall be proved that he inherited the same*, in which case the person from whom he inherited the same is to be considered to have been the purchaser *unless it shall be*

descendible according to the common law, or according to the custom of gavelkind or borough-english, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties, or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right, or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles, and interests, or any of them, shall be in possession, reversion, remainder, or contingency.

Purchaser.—The words “the purchaser” shall mean the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent.

Descent.—The word “descent” shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue.

Descendants.—The expression “descendants” of any ancestor shall extend to all persons who must trace their descent through such ancestor.

Person last entitled.—The expression “the person last entitled to land” shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof.

Assurance.—The word “assurance” shall mean any deed or instrument (other than a will) by which any land shall be conveyed or transferred at law or in equity.

And every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male. Sect. 1.

proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited, will in every case be considered to have been the purchaser, *unless it shall be proved that he inherited the same* (a).

2. It should be kept in view that the explanations in sect. 1, render actual seisin unnecessary in the purchaser or the person to be deemed such, but that all rights and estates, and whether in remainder or not, and whether the party had possession or received the rents or not, are now made the foundation of a right in the *first purchaser*, from whom the descent is accordingly to be traced.

3. The above provision in section 2, renders it necessary to *prove* a descent at every step in order to exclude the last possessor's title as a purchaser, but it does not exclude such proof, and therefore where it can be obtained, the descent will be traced as it has actually taken place, subject to the provisions of the act. It is probable that sellers under contracts, relying upon this provision, will withhold or not search for evidence of the descent; but the courts will not allow such a scheme to prevail, for a purchaser would be entitled to *evidence* that a person assumed to be the purchaser really was so, and would not be compelled to rest on the provision of the statute; which would be inoperative against proof of the descent.

4. Under this section a son claiming by descent from an illegitimate father who was the purchaser, cannot transmit the estate by descent upon the failure of his own issue to his heir *ex parte materna*, although it is said such a result could hardly have been contemplated

(a) Sec. 2; see *post*, pl. 26.

by the framers of the act (*b*). But the descent is to be traced from the purchaser, and not from the person last seised, and in this case, although the son was the person last seised, yet he was not the purchaser under the 2d section, because it was proved that he inherited it from his father, and the mother's relations could not, as such, be heirs to the father, and so the land escheated. The real property commissioners meant to provide for this very case in order to prevent an escheat, by making the last proprietor (the son in this case) the purchaser, in order to let in his other relations (*c*) (I), and they introduced a clause in the bill for that purpose, which was struck out. The want of it should now be supplied.

(*b*) *Doe v. Blackburn*, 1 Mood. & Rob. 547.

(*c*) 1 Rep. 15.

(I) They said they thought that especial regard should be paid to the blood of the first purchaser, in a case which would be liable to occur in consequence of the admission of the half blood to inherit. If an estate should descend from a purchaser to his half-brother, it might happen that the heirs of the second brother would be strangers in blood to the first, and the heirs of the first brother (at the death of the second) strangers in blood to the second: this would be the case if the common parent were illegitimate, and the second brother should die without issue, and there were no other brother or sister, or the issue of such, and it might be the case under other circumstances. They proposed to provide for the case by directing the inheritance to pass to the heir of the first purchaser, when the heir of the last proprietor should not be also heir of the first purchaser.

They further thought that the last proprietor might be treated as if he had been first purchaser, in the rare case in which the line from which the estate descended to the proprietor had failed, for the purpose of admitting to the inheritance his other relations, rather than let it escheat.

It might seem superfluous, they observe, to legislate for cases like these, which might appear very unlikely to occur in practice; they were found, however, to occur in consequence of the acquisition of estates by persons of illegitimate birth, who had in law no relations but their own descendants, or by the descendants of such, and in consequence of the loss of evidence of pedigree in families of mean condition or origin.

5. And when any land shall have been devised, by any testator who shall die after the 31st day of December 1833, to the heir or to the person who shall be the heir of such testator, such heir will be considered to have acquired the land *as a devisee, and not by descent*; and when any land shall have been limited, by any assurance executed after the said 31st day of December 1833, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person will be considered to have acquired the same *as a purchaser* by virtue of such assurance, and will not be considered to be entitled thereto as his former estate or part thereof (*d*).

6. These are alterations of fundamental rules, for by the old law, the heir, wherever it was practicable, took by descent as his better title, and no man could by deed, without departing with the whole estate out of him, raise a fee simple to his own right heirs by that name as purchasers, nor could he by deed at common law make the heirs of his body take by purchase; and although by way of use he could effect the latter object, yet he could not make his heirs general take by purchase, or alter the descent by such a limitation by way of use: to effect that object, it was necessary to depart with the whole estate, and to take under a *new conveyance* an estate which would vest in him or his heirs by purchase according to the limitation (*e*). The heir now takes so absolutely as devisee, that pecuniary legatees are not entitled to have the assets marshalled as against him (*f*).

(*d*) Sec. 3.

(*e*) Co. Litt. 12 b; 22 b, Harg. n.; Watk. Desc. 253—300; Gilb. Uses, 17, and note.

(*f*) Strickland v. Strickland, 10 Sim. 374; see Biederman v. Seymour, 3 Beav. 368; the note to which is corrected in the Corrigenda.

7. And when any person shall have acquired any land *by purchase* under a limitation to the heirs or to the heirs of the body of any of *his ancestors*, contained in an assurance executed after the said 31st day of December 1833, or under a limitation to the heirs or to the heirs of the body of any of *his ancestors*, or under a limitation having the same effect, contained in a will of any testator, who shall depart this life after the said 31st day of December 1833, then and in any of such cases *such land shall descend*, and the descent thereof shall be traced *as if the ancestor named in such limitation had been the purchaser of such land* (g) (I).

8. There was before a *quasi* descent in such cases, but now the ancestor is to be treated as the first purchaser, although he never had any interest in the land.

II. Of descents between brothers and sisters, and to lineal ancestors.

9. No brother or sister is to be considered to inherit immediately from his or her brother or sister, but every

(g) Sec. 4.

(I) It was proposed to still further alter the rule, but the proposition was abandoned. The commissioners say that it had occurred to them that a person devising or settling an estate in fee simple, might be allowed to direct that the donee or devisee should take the estate as if it had come to him from a particular ancestor; that an estate, for instance, might be given to a man and his heirs on the part of his mother. The attempt to create limitations of this nature had been frequently made; the law now forbids such limitations in grants of estates in fee simple, although it allows them on the creation of estates tail. They inclined to the opinion that allowing them in the former case would be a reasonable enlargement of the power of absolute proprietors, and would diminish the inconveniences produced by the technical distinction between inheritance and purchase. In this case they thought the distinction between the whole blood and half blood of the purchaser might be abolished. 1 Rep. 14.

descent from a brother or sister is to be traced through the parent (*h*).

10. Every *lineal ancestor* is capable of being heir to any of his issue ; and in every case where there shall be no issue of *the purchaser*, his nearest lineal ancestor will be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, *so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue* (*i*).

III. Of the preference of males to females.

11. None of the *maternal ancestors* of the person from whom the descent is to be traced, nor any of their descendants, will be capable of inheriting until all his paternal ancestors and their descendants shall have failed ; and also no *female paternal ancestor* of such person, nor any of her descendants, will be capable of inheriting until all his male paternal ancestors and their descendants shall have failed ; and no *female maternal ancestor* of such person, nor any of her descendants, will be capable of inheriting until all his male maternal ancestors and their descendants shall have failed (*j*).

So that paternal ancestors are to be preferred to maternal ; and as between paternal ancestors, males are to be preferred to females ; and so as between maternal ancestors, males are to be preferred to females, and the descendants succeed to the line.

(*h*) Sec. 5 ; see *Collingwood v. Pace*, 1 Ventr. 413, and sect. 10, *post*.
 (*i*) Sec. 6.
 (*j*) Sec. 7.

12. And where there shall be a failure of *male paternal ancestors* of the person from whom the descent is to be traced, and their descendants, *the mother of his more remote male paternal ancestor*, or her descendants, will be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of *male maternal ancestors* of such person, and their descendants, *the mother of his more remote male maternal ancestor*, and her descendants, will be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants (*k*).

13. This adopts Blackstone's well-known view, which it is conceived is the true rule.

IV. Of the half blood.

14. Any person related to the person from whom the descent is to be traced by the *half blood* will be capable of being his heir; and the place in which any such relation by the half blood will stand in the order of inheritance, so as to be entitled to inherit, will be *next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male*; and *next after the common ancestor where such common ancestor shall be a female*, so that the brother of the half blood on the part of the father will inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother will inherit next after the mother (*l*).

(*k*) Sec. 3.

(*l*) Sec. 9.

V. Of attainder.

15. And when the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died *before such descent shall have taken place*, then such attainder will not prevent any person from inheriting such land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the 1st day of January 1834 (*m*) (I).

VI. Of the commencement of the act, and of its operation.

16. But the act does not extend to any descent which took place on the death of any person who died before the said 1st day of January 1834 (*n*).

17. And where any assurance executed before the 1st day of January 1834, or the will of any person who died before the same 1st day of January 1834, contains any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir is entitled to an estate by purchase, then the person or persons who would have answered such description of heir, if the act had not been made, is entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not have been living on or after the 1st day of January 1834 (*o*).

(*m*) Sec. 10.

(*n*) Sec. 11.

(*o*) Sec. 12.

(I) See 54 Geo. 3, c. 145, saving the right of the heir in cases of attainder for felony, with the exceptions of high treason, petit treason, or murder, or of abetting, &c. the same.

18. The intention of the act was to put an end to the necessity of an actual seisin in the purchaser, and the doctrine of a *possessio fratris* is at an end, for the act provides, as we have seen, for the half blood without allowing it to be excluded by such a possession.

19. The act does not provide generally for the want of possession in an heir, nor does it appear to have been necessary to do so, because, as the descent is to be traced from the purchaser, it is indifferent whether the person last entitled was in actual seisin or not, for his seisin, if it existed, would not affect the descent, which is not to be traced from him. This direction, that in every case the descent is to be traced from the purchaser, should never be lost sight of (*p*).

20. It was intended to abolish the rule requiring seisin altogether, and to enact that estates should pass to the heirs of the person who last died entitled, although he might not have had seisin (*q*). But at that time it was not in contemplation to trace the descent from the purchaser, the adoption of which plan rendered the proposed rule unnecessary. It would, however, have been more simple, and would have broken in less upon our habits of tracing a pedigree, if the original plan had been adhered to, and the descent had still been traced from the last owner, and there seems no sufficient reason for preferring the whole blood to the half blood amongst collaterals in the ascending line: the preference was right enough as between brothers and sisters of the last owner, where he bought the estate and was a purchaser in that sense, but in every other case perhaps it would have been simpler and

(*p*) *Post*, p1. 26.

(*q*) 1 Rep. 16.

better to have abolished the distinctions between the whole and the half blood, and more particularly as the act itself enlarges a man's capacity to take in the character of a purchaser. For if a man takes through his father by devise, which is now made to invest him with the character of a purchaser, the estate, on his death intestate and without issue, will go to his sisters of the whole blood in exclusion of the brothers of the half blood, and so in the ascending scale to his aunt of the whole blood in preference to his uncle of the half blood; whereas if the estate had descended to him from his father, who was the purchaser (which but for this statute it would have done, although devised to him), the brother of the half blood would, under the act, have been preferred to the sisters of the whole blood, whilst the father's sisters of the whole blood would have taken before his brother of the half blood.

21. The student may probably like to be able to compare a view of the canons as laid down by Blackstone (r) with a scheme of those which the new law grafted on the old seems to furnish.

CANONS ACCORDING TO BLACKSTONE.

1. THE first rule is, that inheritances shall lineally descend to the issue of the person who last died actually seised *in infinitum*, but shall never lineally ascend.

2. A second general rule or canon is, that the male issue shall be admitted before the female.

CANONS ACCORDING TO THE NEW
LAW GRAFTED UPON THE OLD.

1. THE first rule is, that inheritances shall lineally descend to the issue of the person who last died entitled *in infinitum*.

2. A second general rule or canon is, that the male issue shall be admitted before the female.

ACCORDING TO BLACKSTONE.

3. A third rule or canon of descent is this : that where there are two or more males in equal degree, the eldest only shall inherit ; but the females all together.

4. A fourth rule or canon of descents is this : that the lineal descendants *in infinitum* of any person deceased shall represent their ancestor ; that is, shall stand in the same place as the person himself would have done had he been living.

5. A fifth rule is, that on failure of lineal descendants, or issue of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the three preceding rules.

ACCORDING TO THE NEW LAW.

3. A third rule or canon of descent is this : that where there are two or more males in equal degree, the eldest only shall inherit ; but the females all together.

4. A fourth rule or canon of descents is this : that the lineal descendants *in infinitum* of any person deceased shall represent their ancestor ; that is, shall stand in the same place as the person himself would have done had he been living.

5. A fifth rule is, that on failure of lineal descendants, or issue of the person last entitled, the inheritance shall ascend and descend to the lineal ancestors, and to the collateral relations of the purchaser.

6. A sixth rule or canon is, that the nearest lineal ancestor shall be the heir of the purchaser, in preference to any of the descendants of such lineal ancestor, and to more remote lineal ancestors and their descendants (other than himself) ; and the descendants of every such lineal ancestor shall succeed next after or in default of him ; so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue other than a nearer lineal ancestor or his issue (*s*) ; and subject to this rule and to the next, the descent to collaterals shall be subject to the second, third, and fourth canons.

ACCORDING TO BLACKSTONE.

6. A sixth rule or canon is, that the collateral heir of the person last seised must be his next collateral kinsman of the whole blood,

7. The seventh and last rule or canon is, that in collateral inheritances the male stocks shall be preferred to the female—(that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the females, however near),—unless where the lands have in fact descended from a female,

ACCORDING TO THE NEW LAW.

7. A seventh rule is, that as between collaterals of a purchaser a relation of the half blood shall succeed next after any relation in the same degree of the whole blood and his issue, where the common ancestor shall be a male; and next after the common ancestor where such common ancestor shall be a female.

So that the brother of the half blood, on the part of the father, shall inherit next after the sisters of the whole blood on the part of the father and their issue; and the brother of the half blood on the part of the mother shall inherit next after the mother (*t*).

The collaterals of the half blood of a person last entitled, who was not a purchaser, will take in a course of descent from the purchaser of whose whole blood they are, by force of the direction that in every case the descent shall be traced from the purchaser.

8. The eighth and last rule or canon is, that in lineal ascending and in collateral inheritances the male stocks shall be preferred to the female—(that is, the male ancestors and kindred derived from their blood, however remote, shall be admitted before female ancestors and kindred derived from their blood, however near), — unless where the lands have in fact descended from a female.

(*t*) Sect. 9; the words of the act.

Therefore, under the new law (*u*), none of the maternal ancestors of the person from whom the descent is to be traced [*viz.*, the purchaser], nor any of their descendants, are capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also no female paternal ancestor of such person, nor any of her descendants, is or are capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and no female maternal ancestor of such person, nor any of her descendants, is or are capable of inheriting until all his male maternal ancestors and their descendants have failed.

22. In tracing a pedigree under the act, it should be borne in mind that a man may be a purchaser as the person last entitled, although he never obtained possession of the estate, nor received any of the rents, and that reversions and possessions, and even possibilities, are now placed on the same footing. The ascending line, father, grandfather, and so on, in the scale, take in the place of and in preference to their descendants, who take immediately in succession to them, just as if they, the ancestors, had had successive estates tail; therefore if a son purchase an estate and die without issue, leaving a father, brothers and sisters, the brothers and sisters will now be postponed to the father (*x*). And the half blood are now admitted, except that the preference is given to the whole blood of the first purchaser as between his kindred in equal degree or their descendants.

23. In the common case of a son purchasing an estate and dying intestate leaving issue, and also having brothers and sisters of the whole blood, and also brothers and sisters of the half blood on the part of his

(*u*) Sect. 7; the words of the act; and see s. 3, *supra*, by which the mother of the more remote male ancestor is to be preferred to the mother of the less remote male ancestor.

(*x*) 1st Report, 12;

father, his own issue would take according to the old canons of descent; upon their failure the new law would operate, and the father would take in exclusion of all the brothers and sisters and their descendants, who of course would be *his* issue, but after him they would *all* succeed,—the whole blood just as if he had never intervened, the sons before the daughters, and the daughters all together; but the children by a different venter, that is, brothers and sisters of the half blood to the purchaser, would be postponed to the children of the marriage from which the purchaser issued, viz., to brothers and sisters of the whole blood; and the issue of the latter would be entitled to a like preference with their parents; and the same rule would prevail in each step of the ascending pedigree. The brothers and sisters of the half blood on the part of the *mother* of the purchaser, that is, her children by a different husband, will also inherit, but not until *after her*, and she is postponed until *all* the paternal relations are exhausted.

24. The letting in of the father naturally led to the admission of the half blood, being of the whole blood to him, in succession to him; and brothers and sisters, whose descent from each other is no longer immediate, they having to make out their pedigree through him, properly enough are postponed in enjoyment to him, and thus the object of letting in the lineal ancestors and the half blood, is to that extent happily accomplished without destroying the symmetry of the law of descent.

25. But suppose the father to be the purchaser, and that he has children by different wives, and the estate descends to his son by his first wife, who dies without

issue, a question would arise whether the brothers of the half blood to the deceased were to be preferred to the sisters of the whole blood ; and it seems that they would, for now the descent is to be traced from the purchaser, and not from the person last seised or entitled, and the brothers of the half blood of the person last entitled are of the whole blood of the purchaser. The case does not fall within the 9th section, which provides for the letting in of the half blood : that provision is, that any person related to the person from whom the descent is to be traced by the half blood, shall be capable of being his heir, which does not embrace this case. But the case seems to depend upon the 2d section, which directs in every case the descent to be traced from the purchaser, and that by its own force lets in the half blood of the person last entitled, being of the whole blood of the purchaser ; so that if the son purchased, his sisters of the whole blood would be preferred to his brothers of the half blood ; whereas if his father purchased, the sisters would have to give way to the brothers ; and the same rule prevails in every descending step of the pedigree from the purchaser, which is governed by the 2d section, whilst the ascending steps from the purchaser are regulated by the 9th section. In other words, every descendant of a purchaser will take as heir in his turn, although of the half blood of the person last entitled, and will not be postponed to the whole blood ; therefore if the grandfather was the purchaser and the person last entitled was the grandson, who died without issue, his uncle of the half blood would be preferred to his aunt of the whole blood.

26. By a literal construction of the 2d section it was

generally supposed that if a man purchased in fee, and died leaving issue three daughters only, and one of the daughters afterwards died intestate, leaving issue a son, then as the descent was to be traced from the purchaser, the share of the deceased daughter would descend to her surviving sisters and to her own son in coparcenary, and consequently in the result each of the surviving sisters would take four-ninths, and the son one-ninth only, of the entirety (*y*). This construction would have surprised the framers of the act, who evidently did not intend to provide against the whole of the estate of a woman, although a coparcener, descending to her son: that was a case which required no remedy. The late V. C. Shadwell accordingly decided that the case was left to the old law, and that the son would inherit the entire share of his mother: in thus deciding he did no violence to the words of the statute, but by a judicious construction of them prevented them from creating a mischief where none before existed: it would have been no amendment of the law of inheritance to take from a son two-thirds of his mother's estate in order to vest them in his aunts. In the case alluded to, where the bill was for a partition (*z*), a man who was assumed to be the purchaser died in 1826 intestate, leaving two daughters, *B.* and *C.*, his co-heiresses, who both became seised of the estates. *B.* died intestate in June 1835, leaving *D.*, her eldest son and heir at law. *C.*, the other daughter, died in 1839 intestate, leaving *E.* her eldest son and heir at law. The representatives of *D.* (the son of the daughter who died first) claimed five-eighths against *E.* (the son of the daughter who died last), contending that under the 2d section

(*y*) 1 Hayes' Conv. 314.

(*z*) Cooper v. France, 14 Jur. 214.

of the statute *B.*'s moiety descended in moieties on her son *D.* and her sister *C.*, so that *D.* took only one-fourth = two-eighths, and *C.* took the other one-fourth or two-eighths, which being added to her original two-fourths or four-eighths, made six-eighths, and that upon her death these six-eighths descended in equal moieties to her own son and to the son of her deceased sister, so that the former took only three-eighths, and *D.*, her sister's son, took the other three-eighths, which being added to his original two-eighths made five-eighths. Nothing can show more forcibly the absurdity of the law according to this construction : under it *D.*, although his mother's heir, lost half of his inheritance on her death ; whilst on his aunt's death, although she also left a son and heir, he gained more than he had previously lost. But Shadwell, V. C., during the argument, said the question was, whether the act applied to a case which was perfectly plain before, as, for instance, to the case of descent on an eldest son.—The question was, whether when a lady died owner of an estate, it was necessary to make any question about her descent if she leaves an only child,—whether this section will be made to apply to a case where the circumstances did not require that the person last entitled to the land should be considered the purchaser,—whether for tracing any descent which the act meant to interfere with it was necessary to trace it further than from the mother to the son. You make this absolutely necessary if you suppose that the act meant to interfere with a plain case, about which there could be no dispute. In giving judgment, the Vice-Chancellor observed that he could not bring himself to entertain the least doubt that *B.*'s four-eighths descended to her

son : he did not see how any one acquainted with the principles of law could doubt. Could you suppose that an act of parliament, by any portion of it, meant to introduce doubt into a case that was so plain before the act passed? Was it not the meaning of the act to leave the law of inheritance in such parts as were plain absolutely as it was found, and only to alter it where it was doubtful? Just observe what was the purview: "To the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require,"—that was the general object stated in distinct words,—“the person last entitled to the land shall, for the purposes of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same.” There the act was speaking of what ought to be the rule in cases where the thing was doubtful; but where the thing was so plain that nobody could doubt, you must make it consistent; and if you see an act was passed to make the thing clear, do not say that the act was to make it doubtful. On looking through the act, that portion of the 2d section appeared to be so plain to him that he should not send the case to law, although he had in the first instance intimated that it would be necessary to do so. It was accordingly declared that *B.*'s son, on her death, took the whole of his mother's moiety of the estate, and that *C.*'s son in like manner took his mother's moiety (1).

(1) The Real Property Commissioners observe, in their report, that the rules of descent are for the most part well understood, and appear to be well suited to the habits and feelings of the people. They state the descent to be to sons and their descendants, and in default of them to daughters, in equal shares, and to the descendants of any deceased

CHAPTER V.

OF THE NEW OPERATION OF DEEDS, AND OF THE MERGER
OF ATTENDANT TERMS (I).

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| <p>1. 8 & 9 Vict. c. 106; <i>lease for a year; feoffment; partition and exchange; surrenders; leases, assignments; "give," or "grant;" stranger to deed; indenting deed.</i></p> <p>2. <i>Conveyance of contingencies, &c.; disclaimer by married woman; contingent remainders saved; merged reversion.</i></p> | <p>3. 8 & 9 Vict. c. 112; <i>merger of attendant terms; saving.</i></p> <p>4. <i>Object of the act.</i></p> <p>5. <i>Satisfied term attendant by express declaration, merged: Doe v. Price.</i></p> <p>6. <i>If right to inheritance barred, so is right to term.</i></p> <p>7. <i>Doe v. Jones.</i></p> <p>8. <i>Observations on that case.</i></p> |
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1. Two important acts affecting the law of real property have lately passed. By the first (*a*), a *lease*

(*a*) 8 & 9 Vict. c. 106; see 7 & 8 Vict. c. 76, and observe the time of its duration. By s. 1 of 8 & 9 Vict. s. 8, of 7 & 8 Vict., as to contingent remainders becoming executory devises, was wholly repealed; and s. 9 as to conveyances of legal estates in mortgages, and s. 10 as to receipts of trustees, were

not re-enacted. The writer may take this opportunity of stating that it was a misapprehension to suppose that he had changed his opinion on the question of perpetuity as bearing upon contingent remainders; see *Cole v. Sewell*, 1 Jo. & Lat.; *Lewis App. to Treat. on Perp.*

daughters, such descendants taking the share which would have gone to the parent, if living. When there is no lineal descendant, the estate goes to the brothers or their descendants, and in default of those to the sisters or their descendants, as before (in the usual priority). "*In case of the failure of brothers and sisters, and their descendants, it becomes necessary to inquire whether the deceased proprietor took the estate himself by inheritance, or whether he acquired it immediately by a deed or will, or, in technical language, was a purchaser.*"

(I) See also 8 & 9 Vict. c. 119, for the purpose of shortening conveyances; 8 & 9 Vict. c. 124, for the like object as to leases.

for a year is rendered unnecessary by providing that all corporeal hereditaments shall, as regards the conveyance of the immediate freehold, be deemed to lie in grant as well as in livery (*b*); a *feoffment* (unless made under a custom by an infant) is made void in law, unless evidenced by deed; and a *partition and exchange* (except of copyholds), and a *lease* required by law to be in writing, and an *assignment* of a chattel interest (not being copyhold), and a *surrender* in writing of an interest in any hereditament, not being a copyhold, and not being an interest which might by law have been created without writing, will be void in law, unless made by deed; but this does not extend to Ireland, as far as relates to a surrender (*c*). A feoffment is no longer to have a tortious operation; an exchange, or a partition is not to imply any condition in law; the word *give* or *grant* is not to imply any covenant in law, except so far as by force of any act of Parliament, it may imply a covenant (*d*). Under an indenture, an immediate estate and the benefit of a condition or covenant may be taken, although the taker be not named a party, and a deed purporting to be an indenture need not be indented (*e*). These several provisions refer to deeds executed after the 1st of October 1845.

2. Contingent interests, possibilities coupled with an interest, and rights of entry, as we have seen, may under the act be conveyed by deed, and a married woman may disclaim by deed (*f*), which provisions are to operate after the 1st of October 1845. And a

(*b*) Sec. 2.

(*d*) Sec. 4.

(*c*) Sec. 3; the word release in this section seems to relate to s. 2; see Sugd. Conc. View, 73.

(*e*) Sec. 5.

(*f*) Sections 6, 7.

contingent remainder existing at any time after the 31st of December 1844, is to be, and if created before the passing of the act, is to be deemed to have been capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger, of any preceding estate of freehold, in the same manner as if such determination had not happened (*g*); and finally, when the reversion on a lease shall after the 1st of October 1845, be surrendered, or merge, the next estate is to be deemed the reversion expectant on the same lease, to the extent and for the purpose of preserving such incidents to, and obligations on the same reversion as but for the surrender or merger would have subsisted (*h*).

3. The other act (*i*), provides that every *satisfied term of years*, which, either by express declaration or by construction at law, shall upon the 31st of December 1845, be attendant upon the inheritance or reversion of any lands, shall on that day absolutely cease and determine, but with an exception, that every such term which shall be so attendant by express declaration, although made to cease, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim and demand, as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with after the 31st of December 1845, and shall for the purpose of such protection be considered in every court of law and equity to be a subsisting term (*k*); and it is further provided that every term of years then subsisting, or

(*g*) Sec. 8.

(*h*) Sec. 9; compare the provisions with those of the 7 & 8 Vict. 76; and keep in view the period

during which the latter will operate.

(*i*) 3 & 9 Vict. c. 112.

(*k*) Sec. 1.

thereafter to be created, becoming satisfied after the 31st December 1845, and which, either by express declaration or by construction of law, shall after that day become attendant upon the inheritance, shall, immediately upon the same becoming so attendant, absolutely cease and determine (*l*).

4. The object of this act appears to be to merge all attendant terms, but to preserve to the persons entitled the protection which a term would have afforded to them, where upon the 31st December 1845 it was attendant by express declaration. But even this is a limited protection, for it gives not such protection as a further assignment of it for a purchaser would confer, but such protection as it would have afforded if it had continued to subsist, but had not been assigned or dealt with after the 31st December 1845. Such, it has been observed, is the power of an act of Parliament, that although such a term has absolutely ceased, yet it is to be deemed for the purposes expressed a subsisting term. But this, it is added, puts an end to the assignment of satisfied terms, and there appears to be no foundation for the notion that any such term can now be kept on foot by assignment (*m*).

5. The point whether a satisfied term attendant by express declaration on the 31st December 1845, ceased on that day, was decided in the affirmative in *Doe v. Price* (*n*), although the Court appears to have been puzzled by the act. An heir at law first mortgaged an estate, supposed to have descended to him, and then sold it, and a fine was levied, which it was held conferred a good title, and upon each occasion an old term

(*l*) Sec. 2; *Garrard v. Tuck*, 8 Com. Ben. Rep. 231.

(*m*) *Sugd. Purch.*, 11th edit., 777.

(*n*) 16 Mees. & Wels. 603.

of 500 years was assigned to a trustee to attend, and all this took place before 1845. It turned out that the ancestor had made a will, and the devisee brought an ejectment against the purchaser, and the devisee, under a Judge's order, added a demise in the name of the trustee of the term. The Court held, 1. that the term had ceased; 2. That the defendant, the purchaser, did not want the protection of the term, as he had obtained a valid title by the fine. But the Court added, that if it had turned out that the defendant wanted the protection of the term on the ground that he was a purchaser for valuable consideration, it would be necessary for them to determine what course he ought to take; probably it would be necessary for him to apply to a court of equity, or to apply to that Court to strike out of the declaration the demise in the name of the trustee. We may observe that, assuming the term to be in existence, it was in direct contravention of the act to allow the devisee to add a demise in the name of the trustee of the term, as he was the trustee by express declaration for the purchaser. But if the fine had not established a good title in the purchaser, yet I apprehend there was no real difficulty, for although the term had ceased, yet the purchaser required and was entitled to the protection of it, and the Court in which the ejectment was brought was bound under the act to give him the same benefit as if the term had existed, and he had set it up in bar of the ejectment. The 1st section of the act expressly enacts, that the term although thereby made to cease and determine, shall still afford protection, and “shall *for the purpose of such protection* be considered in every court of law and of equity to be a subsisting term.”

6. In a later case in the same court (*o*), where upon the purchase of the reversion in fee a satisfied term was assigned to a trustee to attend, the heir of the purchaser brought an ejectment against a stranger, and had no demise by the trustee of the term, for the trustee had died, and administration had been refused as the term was merged by the statute, the counsel for the heir properly urged, that if his right was not barred he did not want the term which had ceased, and he admitted, that if the right to the inheritance was barred, the term was barred also. The Court held, that under the circumstances the ejectment was barred, and it became, they said, unnecessary to consider the effect of the satisfied term, though they had no doubt that it was to be deemed to have absolutely ceased under the statute on the 31st December 1845, and consequently would have afforded no defence to this ejectment.

7. In a still later case (*p*) the term was held not to have ceased. In 1838 Mary Humphreys, who was seised in fee, demised the property to Edward Davies for 1,000 years by way of mortgage. [In 1839, for a pecuniary consideration, she conveyed the property to her daughter Caroline in fee, subject to the 1,000 years term. This conveyance was not disclosed to the subsequent purchaser.] In 1842, Mary Humphreys conveyed the fee to Nathaniel Minshall, upon trust to sell and to pay off Davies's mortgage and a further sum, and then upon trust for herself, with a proviso for redemption. In 1844, Mary Humphreys conveyed the fee for a pecuniary consideration to John Clay, subject to the mortgage to Davies. In the same year the executors of Davies having called

(*o*) *Doe v. Mouldsdale*, 16 Mees. & Wels. 689,

(*p*) *Doe v. Jones*, 13 Jur. 824; 13 L. J., Q. B., 260.

in his money, Clay and Meredith Humphreys (who had contracted with Clay for the purchase of a moiety of the property), in consideration of the mortgage money paid by John Thompson to the executors, and of further sums advanced by him to Clay and Humphreys; the executors of Davis assigned the 1,000 years' term to John Thompson, with a proviso that if Clay and Humphreys paid the monies advanced, with interest, on a day named, John Thompson would assign the 1,000 years' term as Clay and Humphreys should direct or appoint. And for further assurance, Minshall and Clay and Humphreys conveyed the fee to Richard Thompson in trust for sale, or to re-convey to Clay and Humphreys on payment of the mortgage money (I). In September 1847, part of the property being required for a railway, Clay received the purchase money from the company, and thereout paid off the mortgages. The question in an ejectment on the demises of Clay and Humphreys and of Richard Thompson and John Thompson *against the person claiming under the conveyance of 1839*, was, whether the term was satisfied under the statute, and attended the inheritance by intestment of law, so that it could not be set up in the ejectment. The Court of Queen's Bench held that the term was a subsisting one, upon which the lessor of the plaintiff could recover. They observed that it was not necessary to decide whether the defendant claiming to have the fee could maintain that this was a satisfied term, the satisfaction of the mortgages having been

(I) The Lord Chief Justice, in delivering judgment, stated that the term was declared to be "to secure the mortgage money to [John Thompson], and afterwards to be re-conveyed as Clay and Humphreys should direct."

made not by him but by Clay, under a mistaken belief that the equity of redemption in fee had been conveyed to himself, because they were of opinion that this term was not within either of the alternatives in the statute for determining terms. It was not attendant on the inheritance by express declaration, there being no such declaration, neither was it by construction of law, for the trust was expressly declared to be for Clay and Humphreys, who had not the inheritance, and although they were supposed to be entitled thereto when the deed was executed, that supposition was then proved to have been founded on a mistake. That mistaken supposition had no effect upon the express words of the instrument.

8. It seems difficult to reconcile this decision upon the grounds stated with the provisions of the statute. The term clearly was a satisfied one, and it cannot matter in most such cases by whom it was satisfied. The question is between the two purchasers, and not between either of them and the mortgagee. The term, when the money was paid off, became attendant on the inheritance by construction of equity. If the express trust for Clay and Humphreys was to be attended to, that in effect was a trust to attend the inheritance, for they were considered to be the owners of the inheritance; and the trust therefore was tantamount to an express trust to attend; and it cannot, it may be thought, vary the construction that their title to the fee was, unknown to them, an infirm one, and that they required the protection of the term; for that protection, whether wisely or not, was intended to be taken away by the statute. The term was treated by the Queen's Bench as if it had been declared to be in

trust for Clay and Humphreys as a term in gross, and to form part of their personal estate in all respects, and not to attend the inheritance, however valid their title to it might prove to be: so that the 1,000 years' term would go to their executors as part of their personalty, and the remainder only in fee expectant upon the term would go to their heirs. This view cannot be maintained independently of the statute, and the statute introduces no new rule of construction. Under the old law the term would have attended the inheritance, and would have protected it against the secret conveyance to the daughter: by the new law the term, it may be urged, ceased to exist when the money was paid off, and if so it no longer afforded any protection to the later purchaser. If Clay and Humphreys were not to be considered as having paid off the mortgage, inasmuch as the estate itself cleared off the debt, it would perhaps be difficult to support the decision. The Court deemed it unnecessary to decide whether the defendant could maintain that the term was a satisfied one, as the mortgage was satisfied not by him but by Clay; so that the payment was treated as if made by Clay and Humphreys out of their own money. Now if that view could be supported, it would seem that the term ought *not* to have been treated as a satisfied term, and that the case might have been decided in favour of the plaintiff on that ground. For it will be observed that the fee was conveyed to the daughter in 1839, subject to the 1,000 years' mortgage term, to which of course it would have been subject had there been no such provision in the conveyance to her. Now she was not entitled to hold the estate discharged of that term as a mortgage, for

in the view in which we are now looking at the case, it had not been paid off by any person through whom she claimed ; and Clay and Humphreys, although they could not avail themselves of the term *as a protection to the fee simple which they supposed they had acquired*, yet they were entitled to hold the term through Thompson, the mortgagee, until they were paid off the original mortgage money. If the daughter had, after the decision at law, filed a bill to redeem, the operation of the act in this difficult case must have been determined. It should be borne in mind that it was not decided that Clay and Humphreys were entitled to protect by the term the fee supposed to have been conveyed to them, but it was simply decided that they were entitled to make use of the term, which had not been re-assigned, as a term still subsisting in the mortgagee : and that decision would not have been open to objection had Clay and Humphreys paid off the mortgage with their own money, and the case had been decided upon that point. But the conveyancer is embarrassed by the grounds upon which the decision was rested.

CHAPTER VI.

OF RELIEF AGAINST DEFECTS IN LEASES GRANTED UNDER POWERS OF LEASING.

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| <p>1. { 12 & 13 Vict. c. 26 : <i>invalid lease</i>
under power of leasing to
operate as a contract for
2. { valid lease in favour of
lessee.</p> <p>3. Acceptance of rent a confirma-
tion.</p> <p>4. { Leases granted prematurely, va-
lid if lessor live to time when
7. { he could have granted them.</p> <p>5. { Leases to operate under power.
8. }</p> | <p>6. Rights of lessors and lessees
saved.</p> <p>9. Right of lessee under the act :
hardship on remainder-man.</p> <p>10. 13 & 14 Vict. c. 17 : new pro-
vision as to acceptance of rent :
confirmation in writing re-
quired.</p> <p>11. Where person able to confirm
the lease without variation,
lessee bound to accept the con-
firmation.</p> <p>12. Observation on the two acts.</p> |
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1. THE extent to which equity would relieve against defects in leases under powers of leasing has been fully considered elsewhere (a); and we have now to state the aid afforded by the legislature to lessees under powers whose leases are defective. The first act passed with that object is the 12 & 13 Vict. c. 26 (b), which recites that, through *mistake or inadvertence* on the part of persons granting leases, and through *ignorance* on the part of lessees of the titles of persons from whom leases are accepted, leases granted by persons having valid powers of leasing are frequently invalid as against

(a) Sugd. Pow.

this act was not to come into operation until the 1st June 1850.

(b) By the 12 & 13 Vict. c. 110,

the successors in estate of such persons *by reason of the non-observance or omission of some condition or restriction, or by reason of some other deviation from the terms of such powers*. And it recites that leases granted in the intended exercise of such powers are sometimes invalid as against the successors in estate of the persons granting the same, by reason that at the time of granting the same the person granting the lease could not lawfully grant such lease, although at a subsequent time, and during the continuance of his estate in the hereditaments comprised in such lease, he might have granted the same in the lawful exercise of such power.

2. The act then provides (c) that where, in the intended exercise of any such power of leasing as aforesaid, *whether derived under an act of Parliament or under any instrument lawfully creating such power*, a lease had been or should thereafter be granted which is, by reason of the non-observance or omission of some condition or restriction, *or by reason of any other deviation from the terms of such power*, invalid as against the person (I) entitled after the determination of the interest of the person granting such lease to the reversion, or against other the person who, subject to any lease lawfully granted under such power, would have been entitled to the hereditaments comprised in such lease, such lease, in case the same have been made

(c) Sec. 2.

(I) And the act includes corporations aggregate or sole, unless there be something in the context repugnant to such construction ; sec. 1 : but it does not extend to any lease by an ecclesiastical corporation or spiritual person, or to any lease of the possessions of any college, hospital, or charitable foundation, sec. 7 : and see *infra*, pl. 6 ; nor does it extend to Scotland ; sec. 8.

bonâ fide, and the lessee named therein, his heirs, executors, administrators, or assigns (as the case may require), have entered thereunder, shall be considered in equity as a contract for a grant *at the request of the lessee, his heirs, executors, administrators, or assigns* (as the case may require), of a valid lease under such power, to the like purport or effect as such invalid lease as aforesaid, *save so far as any variation may be necessary in order to comply with the terms of such power*; and all persons who would have been bound by a lease lawfully granted under such power shall be bound in equity by such contract, provided that no lessee under any such invalid lease as aforesaid, his heirs, executors, administrators, or assigns, shall be entitled, by virtue of any such equitable contract as aforesaid, to obtain any variation of such lease, where the persons who would have been bound by such contract are willing to confirm such lease without variation.

3. And it is provided that the acceptance of rent under any such invalid lease shall, as against the person so accepting the same, be deemed a confirmation of such lease (*d*).

4. And it is further provided, that where a lease granted in the intended exercise of any such power of leasing as aforesaid is invalid by reason that, at the time of granting thereof, the person granting the same could not lawfully grant such lease, but the estate of such person in the hereditaments comprised in such lease shall have continued after the time when such or the like lease might have been granted by him in the lawful exercise of such power, then in every such case such lease shall take effect, and be as valid as if the same

had been granted at such last-mentioned time, and all the provisions contained in the act shall apply to every such lease (*e*).

5. And it is also provided, that when a valid power of leasing is vested in or may be exercised by a person granting a lease, and such lease (by reason of the determination of the estate or interest of such person or otherwise) cannot have effect and continuance according to the terms thereof independently of such power, such lease shall, *for the purposes of the act*, be deemed to be granted in the intended exercise of such power, although such power be not referred to in such lease (*f*).

6. The rights and remedies of lessees under any covenant for title or quiet enjoyment in such lease, and the rights and remedies of lessors or reversioners for breach of covenants, conditions, or provisoes in the leases on the part of the lessees to be observed and performed are saved (*g*). And the act is not to extend to any lease where before the act passed the hereditaments comprised in such lease had been surrendered or relinquished, or recovered adversely by reason of the invalidity thereof, or there had been any judgment or decree in any action or suit concerning the validity of such lease, and was not to prejudice or affect any action or suit already commenced or then pending in any court of law or equity (*h*).

7. The provision which gives validity to leases granted prematurely, where the lessor lives until under his power he might lawfully have granted such a lease, directs all the provisions in the act to be applied to every such lease. This seems to require that the lease

should have been granted *bonâ fide*, and that there should have been an entry under it. Thus qualified it is likely to operate beneficially. The principle had already been applied by equity to the case of jointuring powers (i), and to some extent to contracts for leases under powers (k).

8. Where a lessor does not refer to his power, but his interest is insufficient to give continuance to the lease, it is well settled that the lease will operate as an execution of the power. Now this principle is applied by the act to leases which would be invalid under the powers for the purpose of giving effect to them, as contracts subject to any necessary variation. This was quite right, but the general provisions of the act will probably lead to some difficulty in their application to the various cases which will arise where the deviation from the power is matter of substance and not merely of form.

9. Under the provisions of the act, every *bonâ fide* lease under a power, where the lessee has entered under it, which is invalid as an exercise of the power—whatever is the deviation from the terms of the power which occasions such invalidity—will operate as a binding contract at the will of the lessee, subject to such variation as may be necessary in order to comply with the terms of such power. But the person bound to give effect to such a contract with variations may prevent the lessee from obtaining a new lease with variations, if he is willing to confirm such lease without variation. The act bore hardly upon persons in remainder, for they must either have adopted an invalid lease as it stood, or the lessee might compel

(i) Sugd, Pow. 19, 120.

(k) Sugd, Pow. 363.

them to grant a valid lease with such variations as the power might require, whilst they had no means of compelling the lessee to accept a new lease, either with or without the proper variations; and the new law was considered to be open to objection, as far as it made an acceptance of rent without any qualification a confirmation as against the person accepting it of such invalid lease as it stood, whatever might be the cause of its invalidity.

10. To *obviate* these *objections*, before the act came into operation a later act (*l*), for which we are indebted to the learned framer of the former, was passed, by which it was enacted, that so much of the said first recited act as enacted that the acceptance of rent under any such invalid lease as therein mentioned should, as against the person accepting the same, be deemed a confirmation of such lease, should be repealed. And it was enacted, that where upon or before the acceptance of rent under any such invalid lease as in the said first recited act mentioned, any receipt, memorandum, or note in writing confirming such lease is signed by the person accepting such rent, or some other person by him thereunto lawfully authorised, such acceptance shall, as against the person so accepting such rent, be deemed a confirmation of such lease.

11. And it was enacted, that where during the continuance of the possession taken under any such invalid lease, as in the first act mentioned, the person for the time being entitled (subject to such possession as aforesaid) to the hereditaments comprised in such lease, or to the possession or the receipt of the rents and profits thereof, is able to confirm such lease without variation,

the lessee, his heirs, executors, or administrators (as the case may require), or any person who would have been bound by the lease if the same had been valid, shall, upon the request of the person so able to confirm the same, be bound to accept a confirmation accordingly; and such confirmation may be by memorandum or note in writing signed by the persons confirming and accepting respectively, or by some other persons by them respectively thereunto lawfully authorised; and after confirmation and acceptance of confirmation, such lease shall be valid, and shall be deemed to have had from the granting thereof the same effect as if the same had been originally valid.

12. As the law, therefore, now stands under these important acts, a remainder-man cannot be taken by surprise in accepting rent from a tenant when his remainder falls into possession; and if any person is competent to confirm an invalid lease without variation, the lessee may be compelled to accept such confirmation. This, so far, places the lessee and the remainder-man on the same footing; but still, under the original act, the lessee may compel a new lease to be granted to him with necessary variations, but the remainder-man has not a corresponding power to compel the lessee to accept such a lease; that is, a lease with necessary variations. It would be difficult to fix by legislation the corresponding equities between such parties.

CHAPTER VII.

OF TITLE BY DEVISE.

SECTION I.

WHO CANNOT MAKE A WILL, AND HOW A WILL IS TO BE EXECUTED AND ATTESTED.

1. *Wills which are not within the act.*
2. *Rules which remain unaltered.*
3. *Infant cannot make a will.*
4. *Married woman's power to make a will.*
5. *Lunatics, &c., incapable of making a will.*
6. *Alien's will.*
7. *Will made under a disability.*
8. *How a will is to be executed.*
9. *Appointments by will included.*
10. *Publication unnecessary.*
11. *Witnesses how to attest will.*
12. *No relief in equity: appointment.*
13. *Legacies² by unattested codicil not supported by charge in will.*
14. *Testator's signature to be at the foot or end of will.*
15. *Early construction of the words.*
16. *Where a printed form was used.*
17. *Name introduced into the attestation clause.*
18. *A signature in the margin invalid.*
19. *Restricted construction of the words "foot or end."*
20. *Smee v. Bryer: signature required to be immediately at conclusion of will.*
21. *Observations thereon.*
22. *Signature after attestation clause still valid: even where it follows the names of the witnesses.*
23. *Cases in which the rule in Smee v. Bryer has been applied: Holbech v. Holbech.*
24. *Where the signature is after the attestation clause, there must not be a blank space before that clause: Minty's case: Hearne's case: Hill's case.*
25. *Whittle's case contra.*
26. *Smith's case: appointment.*
27. *Shadwell's case.*
28. *White's case.*
29. *Observations on those cases.*
30. *Rowe's case: Wrightson's case.*
31. *Space allowed for a blind testator's signature.*

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| <p>33. <i>Will must be signed before witnesses sign: testimony of witnesses.</i></p> <p>34. <i>Attesting witness may sign for testator: marksman: signature by first husband's name.</i></p> <p>35. <i>What is a sufficient acknowledgment by testator of his signature.</i></p> <p>37. <i>May be more than two witnesses: competency of witnesses: felony: lunacy.</i></p> <p>38. <i>How they are to sign: marksman: initials.</i></p> | <p>39. <i>What is a sufficient presence of testator during signature by witnesses: blind man.</i></p> <p>40. <i>Not material where witnesses place their signatures.</i></p> <p>41. <i>No form of attestation necessary.</i></p> <p>42. <i>Where a codicil sets up an informal will: incorporation by reference of other papers.</i></p> <p>43. <i>Effect cannot be given by will to future codicils not duly executed: operation of confirmation.</i></p> <p>44. <i>Effect of unattested and unexplained alterations.</i></p> |
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1. THE act for the amendment of the laws with respect to wills, which does not extend to any will made before the 1st January 1838, nor to any estate *pur autre vie* of any person who died before that day, nor to Scotland (*a*) (1), first provides as to what property a man may dispose of by will; 2, by whom a will may not be made; 3, how a will is to be executed,

(*a*) 1 Vict. c. 26.

(1) By sect. 34, it is enacted, that the act shall not extend to any will made before the 1st day of January 1838, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of the act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived. The words which prevent the act from extending to any will made before 1st January 1838, do not apply where a will so made is republished by a codicil after that date; the republication being the new making of the will and the codicil, need be attested by two witnesses only; *Brooke v. Kent*, 3 Moo. P. C. C. 334; *Andrews v. Turner*, 3 Adol. & Ell. N. S. 177; *Winter v. Winter*, 5 Hare, 306. The act, by the same section, is not to extend to any estate *pur autre vie* of any person who shall die before the 1st day of January 1838. And by sec. 35, it is enacted, that the act shall not extend to Scotland.

and the effect of an attestation by legatees and creditors ; 4, how a will is to be revoked and revived, and how it is to operate ; 5, the operation of residuary and general devises ; 6, where words of limitation shall be supplied, and the construction of the words “ die without issue,” &c., and of devises to trustees ; 7, where devises shall not lapse ; 8, when the act is to operate ; and of each of these in its turn (1) ; but not exactly in the order of the statute.

(1) By sec. 1, it is enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in the act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows ; (that is to say,) the word “ will ” shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an act passed in the twelfth year of the reign of King Charles the Second, intituled, “ An Act for taking away the Court of Wards and Liveries, and Tenures *in capite*, and by Knights Service, and Purveyance, and for settling a Revenue upon His Majesty in lieu thereof,” or by virtue of an act passed in the parliament of Ireland in the 14th and 15th years of the reign of King Charles the Second, intituled, “ An Act for taking away the Court of Wards and Liveries, and Tenures *in capite*, and by Knights Service,” and to any other testamentary disposition ; and the words “ real estate ” shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein ; and the words “ personal estate ” shall extend to leasehold estates and other chattels real, and also to monies, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein ; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing ; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

And by sect. 2, it is enacted, that an act passed in the 32d year of the

2. The act has no provision as to the date of a will, but of course every will should be dated, although a

reign of King Henry the Eighth, intituled, "The Act of Wills, Wards, and Primer Seisins, whereby a Man may devise Two Parts of his Land;" and also an act passed in the 34th and 35th years of the reign of the said King Henry the Eighth, intituled, "The Bill concerning the Explanation of Wills;" and also an act passed in the parliament of Ireland in the 10th year of the reign of King Charles the First, intituled, "An Act how Lands, Tenements, &c. may be disposed by Will or otherwise, and concerning Wards and Primer Seisins;" and also so much of an act passed in the 29th year of the reign of King Charles the Second, intituled, "An Act for Prevention of Frauds and Perjuries;" and of an act passed in the parliament of Ireland in the seventh year of the reign of King William the Third, intituled, "An Act for Prevention of Frauds and Perjuries," as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie*, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an act passed in the fourth and fifth years of the reign of Queen Anne, intituled, "An Act for the Amendment of the Law and the better Advancement of Justice," and of an act passed in the parliament of Ireland in the sixth year of the reign of Queen Anne, intituled, "An Act for the Amendment of the Law and the better Advancement of Justice," as relates to witnesses to nuncupative wills; and also so much of an act passed in the 14th year of the reign of King George the Second, intituled, "An Act to amend the Law concerning Common Recoveries, and to explain and amend an Act made in the 29th year of the reign of King Charles the Second, intituled, 'An Act for Prevention of Frauds and Perjuries,'" as relates to estates *pur autre vie*; and also an act passed in the 25th year of the reign of King George the Second, intituled, "An Act for avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that Part of Great Britain called England, and in His Majesty's Colonies and Plantations in America," except so far as relates to His Majesty's Colonies and Plantations in America; and also an act passed in the parliament of Ireland in the same 25th year of the reign of King George the Second, intituled, "An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates;" and also an act passed in the 55th year of the reign of King George the Third, intituled, "An Act to remove certain Difficulties in

date is not required by law. It has no reference to the statute of uses, but that statute would, where required, operate upon devises under it. It provides, as we shall see, what quantity of estate shall in certain cases be taken by trustees under a devise, but it does not, except by its general provisions, direct how trust and mortgaged estates shall pass by devise, but properly leaves that to the old rules of construction. Indeed, with certain exceptions, it properly leaves the construction, as of old, to the courts having jurisdiction. It leaves the doctrines of equity upon election and satisfaction, and the like, wholly untouched; but by enabling a man by will to dispose of after-acquired estates, it renders it often unnecessary to have resort to the doctrine of election. The law as to donations *mortis causa* also remains unaltered, and the act does not extend to the colonies (*b*).

I. By whom a will may not be made. The provisions simply are,

3. That no will made by any person under the age of twenty-one years shall be valid (*c*). This effected a great alteration as regarded personal estate, and it prevents an infant from making a will, even under a power of personalty (*I*). The will of an infant would

(*b*) See II. Sugd. Wills, 142, 143.

(*c*) Sec. 7.

the Disposition of Copyhold Estates by Will," shall be and the same are thereby repealed, except so far as the same acts or any of them respectively relate to any wills or estates *pur autre vie* to which the act does not extend.

(*I*) In the case of an illegitimate child, this provision may carry his personal fortune to the Crown instead of to those who might justly be the objects of his testamentary bounty. In the case of an infant having a power to appoint personalty by will, marrying and having children and dying under twenty-one—a case of not infrequent occurrence—the

not become operative by attaining his majority. The act makes a will speak as to the property comprised in it as at the death of the testator, but that does not extend to the testator's capacity, or to the objects of his bounty. The power to an infant to appoint by will testamentary guardians of any child of his under twenty-one, and not married, appears to be repealed; for although the 12 Car. 2, c. 24, s. 8, which gave the power by deed or will, is not repealed, yet the word *will* is by the 1st section extended to a will under the statute of Charles, and by the 7th section *no will* made by any person under twenty-one is to be valid. This, it has been supposed, was probably not the intention, for no inconvenience had resulted from the power given by the statute of Charles (*d*): the power, however, to an infant to appoint guardians under the 12 Car. 2 *by deed* still remains.

4. That no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of the act (*e*). She may therefore still dispose by will of any real or personal property settled to her separate use, or over which she has a power of appointment by will; so she may make a will of personal estate with her husband's consent, or she may appoint an executor to a will of which she is executrix, and she may make a will when her husband is banished for life by act of Parliament, or has abjured the realm, or any other will which as a

(*d*) H. Sugd. Wills, 6.

(*e*) Sec. 8.

alteration prevents him from providing for his family, and the property, contrary to the intention of the donor, may go over to a third person, who was intended to take only in case there was no will of the infant. The case of such a power, with a gift to a third person in default of its execution, ought to have been excepted, H. Sugd. Wills, 7, 8.

married woman she might have made before the act passed. But the act gives her no new power, therefore, to enable her to devise copyholds, a power must be vested in her by surrender, although in other cases the act renders a surrender to the will unnecessary (*h*).

5. The act leaves the old law to operate as to lunatics or the like, and with all the uncertainty which prevails as to what is termed partial insanity (*i*). Of course a will by a sane man cannot be affected by his subsequent incapacity.

6. The act does not affect the will of an alien: such a will would not become operative by his subsequent naturalization (*k*). Nor does it alter the law in regard to persons attainted of high treason or felony.

7. But a will made whilst under a disability, although it will not become operative by the removal of the disability, may yet have effect given to it by republication.

II. How a will is to be executed; and the effect of an attestation by creditors and legatees.

8. It is enacted (*l*), that no will shall be valid unless it shall be in writing, and executed in manner herein-after mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and

(*h*) Doe v. Bartle, 5 Barn. & Adol. 492; see Doe v. Ludlam, 7 Bing. 275; Doe v. Bird, 5 Barn. & Adol. 695.

refused a petition for a commission of review: M.S.

(*k*) Fish v. Klein, 2 Mer. 431; Fourdrin v. Gowdey, 3 Myl. & Kee.

(*i*) Dew v. Clarke, 1 Add. 279; 3 Add. 79; Lord Lyndhurst, C.,

383. (*l*) Sec. 9.

Fourdrin v. Gowdey is inconsistent with Fish v. Klein. Both cases relate to a conveyance inter vivos. But where the alien has made a will which is governed by the late act & then his title to lands previously purchased is confirmed, it seems clear that his will may operate on those lands just as much as if he had made up his mind to make a will, he had purchased them after the date of the act. I doubt whether, under the old law of wills, a devise by an alien followed by a retrospective grant of naturalization & naturalization not yet have been operative (16 Jan. post 2. p. 60)

shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

9. And it is enacted, that (*m*) no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner before required; and every will executed in manner before required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity (I).

10. And it is provided, that every will executed in manner before required, shall be valid without any other publication thereof (*n*). The getting rid of publication is a great improvement.

11. This great alteration requires every will to be attested by two witnesses, and to be signed at the foot, and the witnesses must both be present during the transaction, and sign in the presence of the testator; but no form of attestation is necessary; the witnesses

(*m*) Sec. 10.

(*n*) Sec. 13.

(I) Sect. 11 provides, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of the act. And by sec. 12, it is enacted, that the act shall not prejudice or affect any of the provisions contained in an act passed in the eleventh year of the reign of His Majesty King George the Fourth, and the first year of the reign of his late Majesty King William the Fourth, intituled, "An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy," respecting the wills of petty officers and seamen in the royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize-money, bounty-money, and allowances, or other monies payable in respect of services in Her Majesty's navy; see *Prendergast's case*, 5 No. Cas. 92; *Thompson's case*, *id.* 596; *Hill's case* 1 Robert. 276; *Milligan's case*. 2 Robert. 108.

are required to attest the ceremony, which of course is to be performed in their presence ; and to subscribe the will, but not to subscribe any attestation ; on the contrary, the act says, but no form of attestation shall be necessary. As two witnesses are required, the very subscription of their names proves on the face of it that they, having no other relation to the instrument, sign as witnesses, although it would still be necessary to prove by evidence that the solemnities were duly performed (*o*). But every testamentary paper should of course, in order to avoid all question, have a proper attestation.

12. Existing powers to appoint by will were not excepted out of the act, and are therefore subjected to the common rule. If, therefore, a power authorised an appointment by will attested by one witness, an appointment since the statute by a will with only one witness would be void under the statute. And although the appointment be in favour of a wife or child, for whom equity before the statute would have aided a defective appointment, yet no such relief can be afforded since the statute (*p*).

13. A general charge of legacies by will would not now include legacies given by an unattested codicil (*q*).

14. The statute of frauds only required a will, even of real estate, to be in writing, and signed by the deviser in the presence, &c. of witnesses, and it was held that a will in the testator's handwriting commencing with the words : " This is the will of me, A. B.," was a sufficient signature. This was thought to be an evasion ; to prevent which the new law required

(*o*) See H. Sugd. Wills, 14—20.

(*p*) See H. Sugd. Wills, 21—26,
38, 39.

(*q*) *Id.* 26—28 ; Countess Ferraris v. Lord Hertford, 3 Curt. 468,
infra.

the will to be signed at the foot or end thereof. Upon this simple provision great numbers of wills have been held void upon technicalities, which it is difficult to support according to the plain meaning of the words. In order to prevent a fraudulent addition to any will, a rule has been adopted which has destroyed numerous wills open to no suspicion, and unless the law be altered that rule will continue to render inoperative hundreds of wills in times to come. I do not believe that the decisions to which I refer have acted upon any but genuine testamentary dispositions : they have not struck at one fraudulent will, nor is the rule upon which they proceed likely ever to do so. It would seem to be clear that the words foot or end are not synonymous, although different opinions on this point have been held even by the same Judge (*r*). A signature may be fairly said to be at the end of a will although it may not be strictly at the foot of it. The act does not say at the *immediate* foot or end of the act, and it ought to receive a liberal interpretation, so as to uphold testamentary dispositions whilst it represses fraud.

15. In the early cases, the words of the act were properly construed so as to support wills to which no suspicion attached, and which were signed at the end, and properly witnessed. Thus where the signature was not at the conclusion of the contents of the paper, but after the signature of the testator, and before the attestation, a memorandum was introduced, which contained no disposition, but expressed the testatrix's fear that some of her property would not be as productive as she wished, the will was held to be valid, excluding the addition : the signature was held to be sufficient, being

(*r*) See 6 No. Cas. 26 ; 7 No. Cas. 546, 548.

at the end of the dispositive part of the paper, after the date, and therefore at the end of the will (*s*). And of course the same decision was made where a clause appointing executors was added after the signature of the testator and of the witnesses, for the signature was at the end although not at the foot of the will (*t*). These cases were clearly well decided.

16. So where a printed form (I) was used, and the will ended on the first side, where there was not room for the testator's signature and that of the witnesses, and the testator signed his name at the end of the printed form instead of at the top of the next page (following the printed directions), this was held to be a signature at the foot or end of the will, and yet there was a considerable space in which new matter might have been introduced (*u*); and where the will, which disposed of the whole of the property, was written on the first side of a sheet of paper, and the second side was left entirely blank, and the signature of the testator, attestation clause, and subscription of the witnesses were on the third side, it was held that if the will was not signed at the foot it was signed at the end. The object of the act was to prevent a signature at the commencement being sufficient. In this case the

(*s*) Keating v. Brooks, 4 No. Cas. 253. The cases down to E. T. 1846, are collected in Edwards's very useful Abridgment, 12; but I have of course referred to the reports.

(*t*) Howell's case, 2 Curt. 342; Powell's case, 4 No. Cas. 391.

(*u*) Carver's case, 3 Curt. 29; Bullock's case, 3 Curt. 750.

(I) The learned reporter of these cases observes (2 Robert. 115 n.), that he intentionally omits to report all questions of execution where the will is written on a *printed form*, as those forms have been found, in practice, to increase the difficulties in complying with the requisites of the statute; they ought not, therefore, to be taken, he submitted, as a test.

signature could not be considered in the beginning or in the middle (*x*). In truth, this was no more than writing on only one side of the paper, the whole being written on one sheet. But no clause, although written before the execution, can be operative unless it precedes the signature (*y*).

17. Even the introduction by a testatrix of her name in the attestation clause, where it was clearly intended as a signature, as where the words were signed "as and for the will *of me*, Catherine Woodington," in the presence, &c., was held to be a signature at the foot or end of the will (*z*), although of course an ordinary attestation clause, although written by the testator, cannot operate as a signature (*a*).

18. But a signature in the margin of the will is not a compliance with the statute (*b*); and where the testator purposely left a blank above his signature, in order to receive additions, and which were afterwards inserted therein, it was held that the will was neither signed at the foot or end, the testator always contemplating an addition to it (*c*). There is, however, nothing in the act to prevent spaces from being left in the body of the will (*d*). This appears to be the true view, but it shows how weak the argument is which

(*x*) Gore's case, 3 Curt. 758; 2 No. Cas. 479.

(*y*) Jones's case, 4 No. Cas. 532.

(*z*) Woodington's case, 2 Curt. 324; so in the testimonium clauses, Gunning's case, 5 No. Cas. 75; 1 Robert. 459.

(*a*) Chaplyn's case, 4 No. Cas. 469; Davis's case, 4 No. Cas. 522; Parslow's case, 5 No. Cas. 112.

(*b*) Martin's case, 3 Curt. 754, where the party mistook the printed form; Wakeling's case, 1 No. Cas. 236.

(*c*) Scarlett's case, 4 No. Cas. 480.

(*d*) Corneby v. Gibbons, 1 Robert. 705; 6 No. Cas. 679; Kirby's case, *id.* 693.

objects to any space between the conclusion of the will and the signature.

19. At length it was observed that cases had occurred, before the real purpose of the act had been sufficiently ascertained, in which the Court had given a construction to the statute, as far as possible, to fulfil the real intention of parties; but the Court, it was said, was under the necessity of looking to the clear intention of the act, and one intention was to guard against fraud (*e*). It was consequently held, that although the will was contained in one sheet of paper, yet as it ended at about two-thirds down the second side, and the attestation clause in the testatrix's handwriting, the signatures of the witnesses, and the signature of the testatrix at the bottom of the attestation clause, were written on the third side, leaving two or three lines at the top of the third side, the will was not duly signed (*f*).

20. This new view of the act was followed in a case which it is impossible to peruse without pain (*g*). An aged lady had taken great care to conform to the law. Her will was written by herself *on one sheet of paper*, and was a disposition of the whole of her property; it was contained in the three first sides of the sheet, and terminated very near the bottom of the third side. There was an interlineation near the top of the *first* side. The fourth page was folded in half, so as to have a vertical crease. On this fourth page (*h*) was written

(*e*) See 5 No. Cas. 433, 434. This view appears to have been suggested by the superior court; see Ayres *v.* Ayres, 5 No. Cas. 375; 6 No. Cas. 26; 1 Robert. 466.

(*f*) Willis *v.* Lowe, 5 No. Cas. 428.

(*g*) Smea *v.* Bryer, 6 No. Cas. 20; 1 Robert. 616.

(*h*) See s. 21, of the 1 Vict. c. 26.

“ Attested to the interlineation,” with the signatures of the witnesses following ; and this was *opposite to the interlineation in the first page*, if the sheet were spread out, so that the half of the fourth page on which this was written might form a *quasi* margin of the first page. Below those words, after an interval affording space for three or four lines (because a somewhat larger blank than proved to be necessary had been left by the testatrix for the names of the witnesses, &c. to the interlineation), and on the left-hand side or division of the fourth page, was a regular attestation clause, noticing the interlineation, beneath which the witnesses signed their names, and opposite to this clause, on the right-hand side or division of the same page, appeared the signature of the testatrix (as I call her), about an inch below the signature of the last witness, affixed to the attestation of the interlineation, the signature of the testatrix being thus placed nearly in the middle of the fourth page. The will was held to be invalid. The learned Judge thought that the words “ at the foot or end ” of the will, according to their later construction, required that the signature should have been *immediately* at the conclusion of the will. According to the strict letter of the act, the signature was not at the foot or end of the will, but he was not aware that the Court had interpreted those words so strictly as to hold that the signature must follow immediately the last line of the will. There was plenty of room for the deceased to sign her name at the bottom of the third page, though not for this attestation clause ; and it was no excuse that she thought that the attestation clause must be near her signature. If the third side of the paper had been filled up, and the signature had been placed at the

top of the fourth side, that *might* have been sufficient, but that was not so here.

Smith, 16 per. 21. This new version of the statute puts a strict construction on the words "foot or end," simply, as it seems, to destroy men's wills, instead of supporting them where they fairly follow out the directions of the act. This law ought to have neither a lax nor a strict construction. The will in the case of *Smee v. Bryer* might well be supported according to even a strict construction of the words "foot or end." It cannot be denied that the signature was at the end of the will, although not immediately at the conclusion of it. It is usual to leave some space in all writings at the bottom of the page, and where a letter sometimes ends on the third page, and the signature of the writer with the usual compliments is on the fourth, it cannot be said that the signature is not at the end of the letter, although there might be room for it at the bottom of the third page. It is sometimes difficult, particularly for an aged person, to sign at the bottom of a page. Suppose the testatrix in this case had signed at the top of the fourth page, would not that have been a compliance with the statute? It clearly would if the will had filled up the preceding page (*i*). Are we in every case to measure the exact space below the last line, and to inquire what space the signature of the testator usually occupied? Some persons cannot write their names in a confined space left for the purpose, particularly if they are not "ready writers," or the ceremony makes them nervous. In the case under consideration the testatrix really had a sufficient reason for signing lower

(*i*) See *Goldie's case*, 7 No. Cas. 552, *infra*.

down, for she wished to render the interlineation valid, according to the directions of the act. I am not surprised that this old lady, and the friend whom she consulted, thought the will duly executed; for I should have thought my own secure had it been similarly executed. Upon an appeal, however, to the Privy Council, this decision was affirmed (*k*), as it was the duty of the Courts to construe the enactments according to the plain rules of common sense, not to strain the simple meaning of the words, or be astute in giving special constructions on particular occasions for the purpose of evading the application of the rule, where its application may seem to frustrate or defeat the intention of testators in particular cases (*l*). Now the legislature, by the words *foot or end*, not preceded by the word *immediately*, or the like, manifestly left it open to the Courts to support a *bonâ fide* testamentary disposition where the signature was at the end or after the will, and did not precede it: according, therefore, to the plain rules of common sense, it is confidently submitted that the will ought to have been deemed valid. Unfortunately this important decision has been treated as one from which no general rule can be extracted (*m*).

22. Since this decision it has been held that where at the end of the will the attestation was written like the rest of the will, and the testatrix and the witnesses signed their names beneath it, the will was duly executed. So far, therefore, is still clear, that the signature is at the end of the will although it is preceded by

(*k*) 6 No. Cas. 406.

(*l*) 6 No. Cas. Supp. 41.

(*m*) See 7 No. Cas. 544.

the attestation clause (*n*). And where the signature follows the attestation clause, but between that clause and the signatures of the witnesses there is any dispositive clause, the latter, although written before the execution by the testator, and his name is opposite to part of it, will be void, but will not affect the body of the will: if the clause were to form part of the will the signature of the testator would not be at the foot or end (*o*). It will not vary the case that the attestation being written on one side of a sheet of letter paper concludes with part of the attestation clause, which is carried on to the third page, leaving the second page blank; but this was considered nothing, because the third side was continued from the first (*p*). A will (*q*), also was supported which was written by the testatrix with the attestation clause; and the whole, including the signatures, was written on the same page, but the testatrix, although a small blank space had been left sufficient to receive her signature after the testimonium clause, actually signed after the *attestation* clause (*r*). The learned Judge seemed to be oppressed by the decision on the appeal affirming his own decision in *Smee v. Bryer*: he protested he did not know to what extent the Privy Council would consider the signature in this

(*n*) Beadle's case, 1 Robert. 749; 7 No. Cas. 43; the space between the last line of the attestation clause and the signature of the testatrix was two inches eight-tenths.

(*o*) Standley's case, 7 No. Cas. 69; 1 Robert. 755; Topham v. Topham, 2 Robert. 189; see Cotton's case, 6 No. Cas. 307.

(*p*) Batten's case, 7 No. Cas. 288;

2 Robert. 124; 1 Robert. 749, *nom.* Bauly's case; Corder's case, 6 No. Cas. 556.

(*q*) Whittle's case, 7 No. Cas. 290; 2 Robert. 122; Prentice's case, 7 No. Cas. 440; 2 Robert. 182; Welch's case, *id.* 441; 2 Robert. 179; Cuppage's case, 7 No. Cas. 552; Hester's case, *id.* 547; Holland's case, *id.* 549; 2 Robert. 196.

(*r*) But see Minty's case, 7 No. Cas. 374, *infra*.

case as being at the foot or end of the will. It differed from the case of *Smee v. Bryer* very materially. The difficulty was to know how much space may be left. When there is a large space left the Court would hold that the signature is not at the foot or end; but where, as in this case, there is but a small space, he thought he should not act up to the spirit of the statute if he did not hold it to be a good signature at the foot or end: he could not lay down any precise rule. In one of the latest cases, the will was deemed valid although the signature of the testator *followed* the names of the witnesses to the attestation clause (*s*). It was considered to be under the will. In *Smee v. Bryer* there was no part of the will immediately above the signature of the deceased, and where the signature is on the same side with the conclusion of the will, though some space intervenes, that is a reasonable compliance with the terms of the act of Parliament. The Court, it is said, cannot lay down any specific rule as to what is the conclusion of a will; in some cases the testimonium clause is the conclusion of the will, in other cases the attestation clause may conclude the will, though the signature of the testator ought to be at the end of the testimonium clause (*t*).

23. So far, although it is puerile to measure distances, the decisions supported the wills and are satisfactory. But a case similar to that of *Smee v. Bryer* of course received the like determination (*u*). And

(*s*) *Dawnay's case*, 7 No. Cas. 439; the signature was about an inch from the end of the attestation clause, but two inches below the conclusion of the testimonium clause; see 2 Robert. 178, S. C.

(*t*) *White's case*, 7 No. Cas. 543; 2 Robert. 194; see *Holland's case*, 2 Robert. 196; *Howell's case*, *id.* 197.

(*u*) *Wood's case*, 7 No. Cas. 435; 2 Robert. 180.

other cases have been ruled by it which did not fall properly within the decision. *Holbech v. Holbech* is a strong example (*x*). The will, which gave all the property to the testator's wife, was written by him on two sides of a sheet of note paper, the second side ending with the testimonium and attestation clauses, which filled that side to the bottom, leaving scarcely room for a signature. Beyond the fold of the paper a circumflex is drawn *on the third side* opposite to the testimonium clause on the second side, and another circumflex opposite to the attestation clause; on the right hand side of the upper circumflex was the signature of the deceased, nearly in the centre of the third side, and below it were the subscriptions of the witnesses; thus :

In witness whereof, &c. (testimonium clause).	}	<i>Hugh Holbech.</i> (Seal.)
		<i>Francis Francis.</i> <i>James Gerrard.</i>
Signed and acknowledged, &c. (attestation clause).	}	

The learned Judge thought the principle to be applied to this case was very much determined by that of *Smee v. Bryer*; for although there was scarcely room for the signature on the second side there was considerable space left at the top of the third side above the signature. He could not consider the circumflex as very material. He was of opinion that the signature was not at the foot or end of the will, and so the will was defeated, and this not upon motion *ex parte*, but, after such a motion having been rejected, upon an allegation

(*x*) 7 No. Cas. 294; 2 Robert. 126.

propounding the will. Now as the will with the testimonium and attestation clauses filled the second page, this surely was even a literal compliance with the statute. The testator by the circumflex opposite to the testimonium clause placed his signature as attached to or at the end of the testimonium clause, as the witnesses did their names to the attestation clause, although, in point of fact, they signed a little above that clause; but these are niceties not introduced by the act of Parliament. These circumflexes with the signatures prevented the blank space above the latter on the third page from being used for any improper purpose. If common sense is, as it is said, to guide us in these cases, it seems not to have performed its duty in this instance.

24. So where the will was written by the testator on a sheet of paper, and the dispositive part, and the testimonium clause, and the date were written on the first page, which brought it down to within an inch of the bottom of the page, and there was then a blank space sufficient for about two lines of writing, and then the words "signed by the said testator as his last" ended the writing of the first page, and at the top of the second page the attestation clause was concluded, and immediately under this clause was the signature of the testator, and below, on the left hand, were the names of the witnesses—the motion for probate was refused. The learned Judge said that if the attestation clause had followed the date without any blank space, the Court might hold that the signature was at the foot or end of the will, but he was not aware of any case where a blank space had intervened when it was held that a signature under the attestation clause was

a compliance with the act of Parliament (*y*). This is indeed a harsh construction of the act, for the attestation clause may be treated as part of the will, and spaces in the will itself are not material. Men consider the end of the will to be after all that is written, which accounts for so many signatures being found after the attestation clause. In this very case the testator's medical adviser told him that the will must be signed on the second page, where the same concluded, as he knew from having recently witnessed the execution of a will, that it was requisite that the same should be signed at the end thereof.

25. But the rule which destroys men's wills has been carried out in all its rigour in other recent cases. A will has been held void which was written on one sheet of paper, although four lines of the will were carried over to the fourth page, followed by the testimonium clause, because between the testimonium clause and the attestation clause there was a space of one inch and eight-eighteenths, and the testator (who signed before the witnesses) placed his name below the space subsequently filled up with theirs, and opposite to the fourth line of the attestation clause. The Judge said he was afraid he must hold, after the decision of the Privy Council in *Smee v. Bryer*, though with much regret, that the testator's signature was not "at the foot or end;" and he decided accordingly (*z*). And on the same day, in another case (*a*) (I), probate was

(*y*) *Minty's case*, 7 No. Cas. 374. (*z*) *Hearne's case*, 2 Robert. 112.

(*a*) *Hill's case*, 2 Robert. 114.

(I) On this day (8th November 1849) there were motions for probates of *other wills and codicils*, involving precisely the same question a

refused of a codicil written on a sheet of paper and occupying the first two pages and a part of the third page of the sheet, although the testator's signature was at the foot of each of the first and second pages, and the third page commenced with a gift of his law library to his eldest son (from which I infer that the testator was a lawyer), and was followed by the attestation clause, after which followed the signatures of the testator and of the witnesses; and this simply, incredible as it may appear, because after the last gift and before the attestation clause there was the space of an inch: this clause did not *immediately* follow the disposition of the property. No weight appears to have been given to the testator's signature attached to each of the two first pages.

26. Yet in a case (*b*) before the same Judge a few days later than the last two cases, he admitted to probate a will signed by the testatrix after the attestation clause, although there was a sufficient space for her to have signed her name after the testimonium clause—nearly half an inch. The learned Judge said that if he were to say this signature was not at the foot or end of the will he should, he was afraid, be obliged to set aside all wills. He did not exactly know on what principle the Court was to act if it were not the principle of common sense; and he could not say that, according to the principle of common sense, this signature was not at the foot or

(*b*) Whittle's case, 7 No. Cas. 290; 2 Robert. 122.

the above case furnishes, save that there were greater spaces between the final dispositive words and the attestation clauses: Reporter's note, 2 Robert. 115. A similar note is added to a case heard on the 26th of the same month, 2 Robert. 140.

end of the will. When there was a *large space* left the Court would hold that the signature was not at the foot or end ; but where, as in this case, there was but a small space, he thought he should not act up to the spirit of the statute if he did not hold it to be a good signature at the foot or end. *He was afraid he should make many wills drawn up in solicitors' offices void if he were to pronounce against this.* It may, no doubt, be difficult to decide in many cases, where spaces are left, which is a large space and which is a small space, but it can hardly be contended that the two lines of space in Minty's case, or the inch in Hill's case, were a large space, whilst about a line's width in Whittle's case was deemed a small one. The testamentary dispositions of men's properties should not depend upon such thin distinctions.

27. But other decisions equally open to observation have been made. In Smith's case (c) the will disposed of the whole of the property, and was written on a sheet of note-paper, ending on the middle of the second side, "witness my hand and seal this 23d April 1847 ;" then, *a blank space of about an inch intervening*, the signatures of the deceased and of the witnesses appeared as follows:—

Witnesses,

G. Bateman.

Ann Chase.

Anne (seal) Smith.

The learned Judge observed, that *here was a considerable space left unoccupied*, for what purpose he could not understand. Where the witnesses' names were placed was of no importance, but the signature of

the testatrix must be at the foot or end, and he did not see that it could be so considered in this case. This is indeed a forced construction of the act. The whole of the will, with the signatures, was not simply on one sheet of note-paper, but the whole was finished on the second side, so that the only possible objection was that the testatrix might have signed a little nearer the end of the will. In another like case, where the space left was nearly two inches, and the signature and seal of the deceased preceded the names of the witnesses, the motion was rejected (*d*). In the last case the will was executed under a power of appointment in a marriage settlement, so that the will would have been clearly valid under the power, but was destroyed by this construction of the act of parliament.

28. The will of a son of the late Vice-Chancellor of England met with the same fate. The will (of which four parts were executed) was written by Mr. Shadwell, who was a barrister, on a sheet of note-paper, and it appears to me to have been wholly free from objection. The writing on the first page was carried down close to the bottom; the testamentary part ended on the second side, about an inch and a quarter from the bottom of the page; the concluding words on that page being the appointment of executors. On the third side, *commencing at the top*, were the words, "Signed *by me*, in the presence of the undersigned." *Immediately under this* was the signature of the deceased, and then followed, "Witnessed by us, in the presence of the testator and each other, July 3d, 1848, *J. M., E. M.*" (*e*), just, I must say, as I should

(*d*) Beadon's case, 7 No. Cas. 376; 2 Robert. 139, where the space is said to have been two inches eight-tenths.

(*e*) Shadwell's case, 7 No. Cas. 377; 2 Robert. 140.

in like circumstances have signed my own will. It materially differed from *Smee v. Bryer*, for the testimonium clause formed part of the will (I), and was properly carried to the third page, and the words signed *by me* were entitled to weight. There was a separate attestation clause for the witnesses. But the Judge said that there was ample space for the signature of the deceased at the bottom of the dispositive part of the will; he could not say that the place of the signature was at the foot or end of the will. It might be very cruel to refuse probate of this paper, but he was afraid, according to the doctrine held by that Court and the Superior Court, this will was not signed at the foot or end. *There was no part of the will immediately above the signature of the deceased* (as stated by the Judicial Committee in *Smee v. Bryer*), and he was very sorry he could not consider the signature to be at the foot or end of the will on mere *ex parte* motion. Unfortunately, these *ex parte* decisions become precedents when parties propound the rejected paper.

29. Yet in a later case, the decision in which it seems impossible to reconcile with the decisions in several of the cases already stated, the will was written on a sheet of foolscap paper, and occupied two pages, and a part of the third, but the dispositive part was wholly on the second page, and the last line on that page consisted of a part of the testimonium clause, occupying an entire line, in these words: "In witness whereof I have hereunto set"—and then there was on that page a blank space of six-tenths of an inch, and at the head

(I) The testimonium clause is no part of the dispositive portion of the will, *per Curiam*; Cotton's case, 6 No. Cas. 307; see *supra*, p. 319; *infra*, p. 327.

of the third page was the remainder of that clause, extending to two entire lines and a part of a third line, *and there was then a blank space of one-inch and three-tenths*, after which came an attestation clause, extending rather more than half across the page, and beneath it, at a distance of one-inch eight-tenths, but to the right, was the mark of the testatrix, and the blank space between the last line of the testimonium clause and the signature or mark of the testatrix was five inches and seven-tenths—and the will was admitted to probate (*f*). The learned Judge, after repeating the difficulty he felt in extracting any rule from the judgment in *Smee v. Bryer*, said, that after some reflection he thought he should in no respect impugn that decision when he said that, *generally*, provided the signature of a testator is on the same sheet or page as that on which the will concludes, he meant where there is part of the will *above* his signature, there is, as to that point, a reasonable compliance with the statute. He could not however lay down a universal rule, much less could he pretend to say what would in all cases constitute the *conclusion* of a will. Sometimes the testimonium clause might, in his opinion, form the conclusion, sometimes the attestation clause; though when there is a testimonium clause, the testator's signature ought to be as near to it as possible. Applying that principle to the present case, he was of opinion that the testimonium clause was the conclusion of the will, and that though there was a considerable blank space between the testimonium and attestation clauses, and a still greater between the former clause and the testa-

(*f*) *White's case*, 7 No. Cas. see *Howell's case*, 2 Robert. 197, 543; 2 Robert. 194, *supra*, p. 319; *et qu.*

trix's signature, that the will was signed at the foot or end.

30. This case appears to have been rightly decided, but whether it is reconcilable with *Smee v. Bryer* is another question. It seems difficult to reconcile the decision with that of the same Judge in *Hearn's case* (*g*), or in *Shadwell's case* (*h*), and it is perhaps impossible to reconcile it with his decision in *Hill's case* (*i*) ; without comparing it with other cases. In *Hill's case*, as we have seen, although the whole will was on one sheet of paper, and each of the first and second pages was signed at the foot by the testator, and the third page contained a gift to the son, yet merely because there was a blank of *one inch* between that disposition and the attestation clause, which was followed by the signatures of the testator and the witnesses, the codicil was not admitted to probate : whereas in *White's case* there was no dispositive clause on the third page, and after the testimonium clause was finished on that page, there was a blank space left of one-inch and three-tenths, and the mark of the testatrix was five inches and seven-tenths from the testimonium clause (which was held to be the conclusion of this will), and one inch and eight-tenths, but to the right, beneath the attestation clause.

31. However, on the same day on which *White's case* was decided the learned Judge, in the case of the *Rev. Mr. Rowe*, followed his decision in *Shadwell's case* (*k*). The will was written on two sides of a sheet of letter paper. The disposition was arranged in six

(*g*) *Supra*, pl. 25. (*h*) *Supra*, pl. 23. (*i*) *Supra*, pl. 25.

(*k*) *Rowe's case*, 7 No. Cas. 515 ; 2 Robert. 199 [part of a report] ; and see *Curtis's case*, *id.* 546 ; the like decision.

numbered paragraphs, the sixth containing the appointment of executors, and ending with the date, which concluded at the bottom of the second side. On the top of the third side appeared the attestation and signatures, thus :

Signed, sealed, and delivered in the presence of	}	
<i>Mary Rowe.</i>		(Seal.)
<i>Emily Spittle.</i>		<i>George Hambly Rowe.</i>

The learned Judge said the signature was on the third side of the paper, above which there was no part of the will (I). *He must lay down some rule to place these cases on the same footing.* What was the real distinction between this case and Mr. Shadwell's case? He was *now* inclined to hold that foot and end must be synonymous. There was room for the signature of the deceased on the second side; *not ample, indeed, but room enough for him to have signed* (II). The rule which the Court had laid down was, that where the will is signed on a different side of the paper from that on which the will concludes, it is not a due execution of the will. If a will concludes at the *very bottom* of one side, and the signature of the deceased is *quite at the top* of the next side, it *might* be an exception to the rule. This rule was followed in a like but a more favourable case for probate on the same day; for the two first pages of a sheet of paper were filled up to within about a quarter of an inch of the bottom of each page, with the will ending with the testimonium clause

(I) But it is not a universal principle that the signature on the same side as that on which the will concludes is valid; see Howell's case, 7 No. Cas. 550; 2 Robert. 197; which case *qu.* and consider.

(II) See the statement in 2 Robert. 200.

and date, and at the top of the third page was written the attestation clause and signatures thus :

Signed by, &c.	}	The mark of
The attestation occupied 12 lines.		×
<i>A. P. K.</i>		<i>Charlotte Wrighton.</i>
<i>C. T. Z.</i>		

Now here was no room for the signature at the bottom of the second page, and the attestation was properly commenced at the top of the third page, so that nothing could have been interpolated; and the mark of the testatrix was in such a position with reference to the attestation clause as had frequently been held sufficient. The only possible objection seems to have been that no part of the will was on the third page. The learned Judge said that the circumstances were strong if he could make a distinction; but he could not make a distinction, he must adhere to the rule (*l*). Nevertheless another learned Judge, about the same time, in another Court, decreed probate without difficulty in a case where the dispositive part ended on the first side of a sheet of paper, with the date within nine-tenths of an inch of the edge of the paper; so that no part of the disposition was carried over to the third page, which contained at the top the attestation clause, and the testatrix's name was opposite to it, underneath a small seal, placed a little below the first line of the attestation clause, under which signature the witnesses signed (*m*). This decision was made by one of the Judicial Committee, by whom *Smee v. Bryer*

(*l*) *Wrightson's case*, 7 No. Cas. 548; and this was followed on the same day in *Froggatt's case*, *id.* 550.

(*m*) *Goldie's case*, 7 No. Cas. 552.

was decided. It would be fruitless for the courts to endeavour to distinguish this case from several of the others in which probate has been refused. It is not creditable to the country that this branch of the law should remain in its present state. It should be observed, that in several of the cases in which the will has been duly signed at the end or foot of the will, notwithstanding that there was some space left between the close of the will and the signature, the Court relied on the circumstance that the whole residue was disposed of by the will. Such a disposition is not entitled to much weight, because if the intermediate space were capable of being filled up without any attestation, legacies might be introduced in it which would so far defeat the disposition of the residue. In all the cases referred to, however, there was ample reason to support the wills without relying upon this ground.

32. Where a testatrix was blind, and the will with the testimonium clause ended on the second side of a sheet of paper, leaving only a very small space, but the testatrix's signature was four inches from the top of the third page, beneath which was the attestation clause with the names of the witnesses, the will was held valid. The learned Judge said, that had the testatrix been able to see, he must, in accordance with the decision of the Privy Council, have rejected the motion for probate; but he thought it was but reasonable to make a distinction when a testator is blind, and he allowed the motion (*n*). It has been held at law that the will need not be read over to the blind testator, although in such a case more evidence would be

(*n*) Helling's case, 1 Robert. 753; see *Longchamp v. Fish*, 2 New Rep. 415; II. Sugd. Wills, 139, 140.

required than the mere attestation of signature (*o*). But the Ecclesiastical Courts are more strict on this head, so that the will of a blind man should always be read over to him in the presence of a witness, although not necessarily in the presence of the subscribing witnesses.

33. A will must be signed by the testator before the witnesses sign (*p*); but a will will not be set aside upon merely the infirm or confused recollection of the witnesses (*q*).

34. It has been decided that an attesting witness may sign the will for the testator by his direction, for the direction amounts to an acknowledgment of the signature (*r*); and where a party signing a will for a testator, by his direction, signed it in his own name, but expressed to be on behalf of the testator, and by his direction, the will was deemed valid (*s*). A mark by the testator for a signature is operative, though he can write (*t*). And where a married woman (having been twice married) executed a will under a power, and signed by the name of her first husband, the signature was considered as her mark, and being duly attested, was held to be valid (*u*).

35. The act only requires the testator's signature to be made *or* acknowledged in the presence of the witnesses. Where the will is actually signed by the testator, it is not necessary that he should point out his

(*o*) Longchamp *v.* Fish, 2 New Rep. 415.

(*p*) Olding's case, 2 Curt. 865; Byrd's case, 3 Curt. 117; Cooper *v.* Bockett, 3 Curt. 648.

(*q*) See the last case; Bayliss *v.* Sayer, 3 No. Cas. 22; Brenchley *v.* Still, 2 Robert. 162; *infra*.

(*r*) Bailey's case, 1 Curt. 914; Smith *v.* Harris, 1 Robert. 262.

(*s*) Clark's case, 2 Curt. 329; Blair's case, 6 No. Cas. 528.

(*t*) Bryce's case, 2 Curt. 325.

(*u*) Glover's case, 5 No. Cas. 553; see H. Sugd. Wills, 18.

signature to the witnesses, and say, "This is my signature." The early decisions on the question of acknowledgment appear to be conflicting (*x*). It has, however, been laid down that where there is an actual production of the paper, and the name of the testator is subscribed to it, and there is an opportunity given to the witnesses to see the signature, and the witnesses subscribe, it is a due compliance with the act; but that it is not sufficient merely to produce the paper to the witnesses, where it does not appear that the signature of the testator was affixed to it at the time. The signature, not the will, must be acknowledged by the new act; it is therefore a necessary inference that the witnesses should know that the paper was signed: where therefore the will was so folded by the testator as to conceal the entire contents, and even the attestation clause, and the impression of the witnesses who were asked by him to sign a paper for him was, that the will was not signed by him in their presence, so that it was not proved that they saw it signed or knew that it was so, the will was held to be invalid (*y*). And even where the testator, in the joint presence of the witnesses, *acknowledged the paper to be his will*, but they did not see him sign the paper, nor did they at the time of subscribing see his signature, the writing, as in the last case, being purposely concealed from them, this was held to be a void will upon the previous authority (*z*). The Court observed that it would be quite sufficient to say, "That is my will," the sig-

(*x*) Warden's case, 2 Curt. 334;
Rawlins' case, 2 Curt. 326; Har-
rison's case, *id.* 363; Gaze v. Gaze,
3 Curt. 451; Blake v. Knight, *id.*
547; Keigwin v. Keigwin, *id.* 607;
Philpot's case, 3 No. Cas. 2.

(*y*) Hott v. Genge, 3 Curt. 160;
1 No. Cas. 572.

(*z*) Hudson v. Parker, 1 Robert.
14, affirmed in P. C.; Trinder's
case, 3 No. Cas. 275.

nature being there, and seen at the time; for such words do import an owning thereof: indeed it might be done by any other words, which naturally include within their true meaning acknowledgment and approbation.

36. Whether it is sufficient that one of the witnesses saw the signature where the witnesses did not know that the paper was testamentary, and nothing was said as to the signature, is a question which has been decided both ways (*a*); but it seems now to be clear that both of the witnesses should see the signature, although it is not necessary that they should know that the act is testamentary, and an acknowledgment of the signature in fact, is as operative as one in express terms (*b*); but it was said that an acknowledgment of an unseen signature is nothing: and sealing, we may observe, would not now be deemed signing. We cannot fail to observe that a testator may, as under the old law, deceive the witnesses, and lead them to believe that it is a deed and not a will they are attesting (*c*).

37. As to the witnesses, two only are required, but there is no prohibition against having more: their incompetency as witnesses in general will not affect the validity of the will (I), whether the incompetency be

(*a*) *Harrison's case*, 2 Curt. 363; *Ashmore's case*, 3 Curt. 756; 2 No. Cas. 465.

(*b*) *Faulds v. Jackson*, 6 No. Cas. Supp. 1; where the virtual acknowledgment was deemed sufficient; but the question was,

whether the second witness saw the signature; see *Summers' case*, 7 No. Cas. 562.

(*c*) See *Trimmer v. Jackson*, 4 Burn's Ecc. Law, 130; *British Museum v. White*, 3 Moo. & Pay. 69; *H. Sugd. Wills*, 140.

(I) By sec. 15, it is enacted, that if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial

occasioned by interest in the party, or by his crime, or by the act of God (*d*), the witnesses therefore need no longer be credible ones. A felon or an insane person may be a good witness. It has been remarked upon this provision, that a witness has to speak to the sanity of the testator, and to allow an insane person to be a witness is a mockery. The term witness is now misapplied: a lunatic or a felon may under the act subscribe the will as a witness, but in no proper sense can fill that character (*e*). Of course no man would knowingly have his will witnessed by either a felon or a lunatic.

(*d*) Sec. 14; see H. Sugd. Wills, 33.

(*e*) See *id.* 37; but this is questioned as to lunatics; see 1 Jarm. Wills, 102.

devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will; see H. Sugd. Wills, 31—35. This section contemplates only a beneficial interest; therefore a universal legatee in trust who attested the will, there being no executor named, was allowed to be administrator with the will annexed; *Ryder's case*, 2 No. Cas. 462. Sec. 16 enacts, that in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof. And by sec. 17, it is enacted, that no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

38. The witnesses may still be marksmen (*f*), but they must subscribe. One cannot subscribe for the other, although the latter is unable to write (*g*); nor where a husband and wife are the witnesses can the former subscribe for the latter (*h*): and a witness cannot upon re-execution go over his signature with a dry pen, for that, it seems, is no subscription; and although a testator can give effect to his signature by acknowledgment, a witness cannot (*i*). But where one of the witnesses not knowing how to write had his hand guided by the other, the will was held to be duly attested (*k*). A mistake by the writer in the name of one of the marksmen is not fatal (*l*). Where witnesses upon an immediate re-execution of a will, in consequence of an addition, placed their initials as witnesses, that was deemed valid (*m*); but the initials must be so placed as not merely to identify, but to attest the re-execution (*n*). The witnesses must both sign in the presence of the testator, but they need not sign in the presence of each other (*o*). This was a doubtful point (*p*): and although it has been decided in favour of the will, yet in a case which occurred

(*f*) *Hooley v. Jones*, 2 No. Cas. 59; *Ashmore's case*, 3 Curt. 756; *Amiss's case*, 2 Robert. 116.

(*g*) *Mead's case*, 1 No. Cas. 456.

(*h*) *White's case*, 2 No. Cas. 461.

(*i*) *Playne v. Scriven*, 1 Robert. 772; 7 No. Cas. 122; see *Martin's case*, 6 No. Cas. 694; *Moore v. King*, 3 Curt. 243; 2 No. Cas. 45; *Allen's case*, 2 Curt. 331; *Simmonds' case*, 3 Curt. 79.

(*k*) *Harrison v. Elvin*, 3 Adol. & Ell. N. S. 117; see *Kilcher's case*, 6 No. Cas. 15, where a third person

wrote the witnesses' names whilst they held the top of the pen, although able to write, which was considered bad, but the case does not amount to a decision.

(*l*) *Ashmore's case*, 3 Curt. 756; see *Tozer's case*, 2 No. Cas. 11.

(*m*) *Christian's case*, 7 No. Cas. 265; 2 Robert. 110.

(*n*) *Martin's case*, 6 No. Cas. 694.

(*o*) *Foulds v. Jackson*, 6 No. Cas. Supp. 1.

(*p*) See II. Sugd. Wills, 15.

shortly afterwards, one of the Judicial Committee, who joined in the decision, seemed to be of opinion that the witnesses must sign in each other's presence: he observed that if the law has said that the witnesses must sign in each other's presence, they (the Committee) were bound, and there could be no reasonable doubt raised that the words of the act amounted to this requisition: the testator is to sign or acknowledge in the presence of the witnesses present at the same "time;" he is not to sign or acknowledge before the witnesses present at different times (*q*). Now undoubtedly they must, by the express words, be both present at the same time when the testator signs or acknowledges his signature, but there is no express direction that they shall sign at the same time, or in the presence of each other (*r*); so that there is no reason to suppose that the decision on this point will be disturbed.

39. The witnesses are directed to attest and subscribe the will in the presence of the testator, which is the same direction as in the statute of frauds, and it still of course means the constructive presence of the testator, consequently if they sign where he, if he looked, could see them, the will is valid (*s*); but even if it be in the same room, yet if it was physically impossible that the testator should have seen the witnesses sign, the will cannot be supported (*t*), any more than if it were signed in another room where the wit-

(*q*) *Per* Lord Brougham, in *Casement v. Fulton*, 5 Moo. P. C. 140; see 6 No. Cas. Supp. 16, n.

(*r*) See H. Sugd. Wills, 18.

(*s*) *Shires v. Glascock*, 2 Salk. 633; *Davy v. Smith*, 3 Salk. 395; *Casson v. Dade*, 1 Bro. C. C. 99; *Doe v. Manifold*, 1 Mau. & Selw.

294; *Winchelsea v. Wauchope*, 3 Russ. 441 (cases on the statute of frauds); *Newton v. Clarke*, 2 Curt. 320; see *Hudson v. Parker*, 1 Robert. 14.

(*t*) *Tribe v. Tribe*, 1 Robert. 781; *sed qu.*

nesses were not within reach of the testator's organs of sight (*u*). And the same rule applies to a blind person's will: although he cannot see, the will is invalid where it does not appear that he could, had he had his eyesight, have seen the witnesses sign! (*x*).

40. As the statute does not point out where the witnesses are to sign, their signature for the purpose of attesting, on any part of the paper, will be sufficient; therefore where the will ended on the first side of a sheet of paper, and was signed at the end by the testator, an indorsement written by him on the fourth side, and signed by the witnesses, preceded by the word witness, was held to be valid (*y*).

41. No form of attestation is necessary, and this applies to wills under powers (*z*); but where the due solemnities are not stated, they must be proved, if proof can be obtained. But if upon the face of a will to which there is no memorandum of attestation there be the signature of the testator at the foot or end thereof, and the subscription of two witnesses, in the absence or death of the witnesses, the *prima facie* presumption is that the testator signed in the joint presence of the two witnesses, and that they subscribed in his presence. If the subscribing witnesses do not remember the facts attendant upon the execution of the will, the presumption is the same (*a*). Where, however, the witnesses negative compliance with the requisites of the act, the will cannot be supported unless their evidence be rebutted, by showing, first, that the

(*u*) Ellis's case, 2 Curt. 395; Coleman's case, 3 Curt. 118.

(*x*) Piercy's case, 1 Robert. 278.

(*z*) See 1 Sugd. Pow. *supra*, p.

(*y*) Chamney's case, 1 Robert. 309.
757; 7 No. Cas. 70; see II. Sugd. Wills, 29.

(*a*) Burgoyne v. Showler, 1 Robert. 5, *per Curiam*.

witnesses cannot be credited, or secondly, that upon the statement of the facts their memories are defective ; for the Court, as we have seen, is not bound by the recollection of witnesses (*b*).

42. Although a testamentary instrument is not properly executed or attested, yet if it is clearly referred to by one of later date properly executed and attested, it will be operative, and no particular form of expression is necessary; therefore where there was a will duly executed, then a codicil attested by one witness only, and lastly, a codicil duly executed, which was described as “ another codicil to my will,” the second codicil was held to give operation to the first codicil (*c*). And it of course would be the same if the will were informally executed, but a codicil, duly executed, were to be described as a codicil to his last will (*d*) ; it is not properly a question of incorporation (*e*) : but any other papers may be incorporated by reference in a testamentary instrument duly executed : the paper to be incorporated need not be void or valid *per se*, and whether of itself void or valid, is equally entitled to probate (*f*). But the paper intended to be incorporated must be in existence ; it must be already written (*g*).

(*b*) *S. C.* ; *Ayling's case*, 1 *Curt.* 913 ; *Gove v. Gawen*, 3 *Curt.* 151 ; *Pennant v. Kingscote*, *id.* 642 ; *Keating v. Brooks*, 4 *No. Cas.* 253 ; *Mustow's case*, 4 *No. Cas.* 289, where the witnesses refused to make an affidavit ; *Beach v. Clarke*, 7 *No. Cas.* 120 ; *Brenchley v. Still*, 2 *Robert.* 162.

(*c*) *Ingoldby v. Ingoldby*, 4 *No. Cas.* 493.

(*d*) *Hill's case*, 4 *No. Cas.* 404 ; *Hally's case*, 5 *No. Cas.* 510.

(*e*) See *id.* 512.

(*f*) *Sheldon v. Sheldon*, 1 *Robert.* 81 ; and see *Dickins' case*, 3 *Curt.* 60 ; *Willesford's case*, *ib.* 77 ; *Bacon's case*, 3 *No. Cas.* 644 ; *Smartt's case*, 4 *No. Cas.* 38 ; *Darby's case*, 4 *No. Cas.* 427.

(*g*) *Countess Ferraris v. Lord Hertford*, 3 *Curt.* 468.

43. A man cannot, by a will duly executed, give effect by any direction to future codicils not duly executed (*h*). And even a distinct confirmation by a codicil of his will and codicils will be taken in the strict and primary sense of the words; therefore if there be a will duly executed, and several codicils, some of which are and others are not duly executed, a later codicil, ratifying and confirming his will and codicils, will not give effect to the codicils not duly executed, but only to the will and duly executed codicils (that is, *primâ facie*, to the instruments *not* requiring confirmation), because the intention of the testator to confirm unattested codicils was not clearly manifested on the face of this codicil (*i*). And even where unattested additions were made to a will, which will was duly executed, a later codicil duly executed, commencing, "By this codicil to my will," the additions to the will were not considered to be included as part of the will, and therefore they remained inoperative (*k*). This is undoubtedly a very narrow construction. So where to a will duly executed there were added, on the same sheet of paper, first, a codicil attested by one witness only, and secondly, a codicil duly executed, which referred to the will by its date, and confirmed it, it was held that the first codicil was not rendered valid (*l*).

44. As to alterations unattested and unexplained, a

(*h*) S. C.; see H. Sugd. Wills, 27.

(*i*) S. C.; Croker v. Lord Hertford, 4 Moo. P. C. 539; Utterton v. Robins, 1 Adol. & Ell. 423.

(*k*) Haynes v. Hill, 1 Robert. 795; 7 No. Cas. 256; see Barke's

case, 4 No. Cas. 44; Wollaston's case, 3 No. Cas. 599.

(*l*) Phelps' case, 6 No. Cas. 695; see Smith's case, 2 Curt. 796; Countess Ferraris v. Lord Hertford, 3 Curt. 468; Bradley's case, 5 No. Cas. 186; Baldwin's case, *id.* 293.

difference of opinion appears to exist whether the presumption is that they were made before (*m*), or were made after the execution of the will (*n*). The inclination of the writer would in general cases be in favour of the presumption that they were made before the execution of the will. But of course all alterations made before the will should be noticed in the attestation, and all subsequent alterations should be duly signed and attested.

(*m*) Stow's case, 4 No. Cas. 477.

(*n*) Burgoyne v. Showler, 1 Robert. 5 ; Saumarez case, 3 No. Cas. 208, n. ; see as to the attestation of

alterations, Martin's case, 1 Rob. 712, and *qu.* ; Swindin's case, 2 Robert. 192 ; see particularly *Simmons v. Rudall*, 1 Sim. N. S. 115.

SECTION II.

OF THE REVOCATION AND REVIVAL OF WILLS.

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| <ol style="list-style-type: none"> 1. <i>Revocation by marriage.</i> 2. <i>Revived by codicil.</i> 3. <i>Woman's will under power revoked : exception.</i> 4. <i>No revocation by alteration in circumstances.</i> 5. <i>Revocation by another will, &c., or by burning, tearing, or otherwise destroying the will : when there are two parts, how destroyed.</i> 6. <i>Old rules which are still operative.</i> 7. <i>Destruction of the instrument.</i> 8. <i>Destruction of testator's signature sufficient : so pencil writing, rubbed out.</i> 9. <i>Cancellation not a revocation.</i> | <ol style="list-style-type: none"> 10. <i>How obliterations, interlineations, or other alterations are required to be executed.</i> 11. <i>Obliteration where substitution intended not operative unless the latter is valid.</i> 12. <i>Obliteration effective, where.</i> 13. <i>Magnifying glasses used to discover parts obliterated.</i> 14. <i>Revival of revoked will : of will, first partly revoked and then wholly revoked.</i> 15. <i>Codicil must show an intention to revive a revoked will.</i> 16. <i>Operation of a codicil in reviving revoked wills.</i> 17. <i>Republication : operation of will on the objects of bounty.</i> |
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| <p>18. <i>Republication after the act, passes subsequently acquired estates.</i></p> <p>19. <i>But cannot pass what the words of the will do not comprise.</i></p> <p>20. <i>No conveyance, &c., prevents the will passing the testator's interest at his death.</i></p> <p>21. <i>Will as to the estates comprised in it speaks as if executed immediately before testator's death.</i></p> <p>22. <i>Rule of equity before the act: operation of will on remaining or new interest.</i></p> <p>23. <i>Contract for sale after the will a revocation.</i></p> | <p>24. <i>Lessee with a contract for the fee, devise passes the fee.</i></p> <p>25. <i>Leasehold specifically bequeathed, and then fee conveyed to testator, bequest void.</i></p> <p>26. <i>Effect of an election to purchase under an option, after testator's death, on the devise.</i></p> <p>27. <i>Devise after a contract giving an option to purchase, carries the money to the devisee.</i></p> <p>28. <i>Observations on Emuss v. Smith.</i></p> <p>29. <i>Sale by testator, a revocation of a devise to trustees to sell.</i></p> <p>30. <i>Four modes of revocation.</i></p> <p>31. <i>Will made before the act, wholly revoked by a deed operating a revocation.</i></p> |
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1. EVERY will (*a*) made by a man or woman will be revoked by his or her marriage, except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the statute of distributions.

2. But it may of course be revived by a codicil, confirming his will generally, which will be held to refer to the will existing at the death, and it must stand revived in the state in which it was at the date of the codicil, which alone gave it operation (*b*).

3. The act, as we have seen, provides that marriage shall not revoke the will, where it is made in exercise

(*a*) Sec. 18; see *Marston v. Roe*, 8 Adol. & Ell. 14, a case before the statute; and see H. Sugd. Wills, 55—60.

(*b*) *Neate v. Pickard*, 2 Curt. 406.

of a power, when the estate appointed would not pass to the testator's heir, executor, or administrator, or next of kin, for the only effect of annulling such a will would be not to vest the property in the new family of the testator, but to carry it over to the persons entitled in default of appointment. But it is not necessary that the property, in default of appointment, *must* go to the new family, if he have any, but only that it *may*; for if a man have a general power of appointment, with a limitation in default of appointment to himself in fee, and having a son by his first marriage, make his will and marry again, his will will be revoked; and yet if he die intestate, the estate will descend to the son by the first marriage, in exclusion of the issue by the second. Where in default of appointment the estate is limited to a particular class of issue as purchasers, for example, to all or any of the children of a first marriage, the second marriage will not revoke the will; because, although in default of appointment the heir may take, yet it will not be in the character or with the quality of heir (*c*).

4. But no will is to be revoked by any presumption on the ground of an alteration in circumstances (*d*).

5. And no will or codicil, or any part thereof, is to be revoked otherwise than as aforesaid, or by another will or codicil executed in manner before required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is before required to be executed (*e*), or by the burning, tearing, or otherwise destroying the same, by the

(*c*) H. Sugd. Wills, 55, §6.

(*d*) Sec. 19.

(*e*) See *Brenchley v. Still*, 2 Robert. 162.

testator, or by some person *in his presence and by his direction*, with the intention of revoking the same (*f*) (I).

6. By the old law, a second will inconsistent with the first, as where the property was devised away to

(*f*) Sec. 20 ; see *Doe v. Harris*, the 1st January 1838 ; *Hobbs v. 8 Adol. & Ell. 13*. This section Knight, 1 Curt. 768.
applies to a will executed before

(I) Where there are two parts of a will, and the testator destroys but one, the question whether the other is equally destroyed in law will still depend on the old rules. Where the testator has but one part in his possession, and the duplicate is in the possession of another, the legal presumption is that the destruction of the former prevents the operation of the latter ; *Seymour's case*, 2 Com. 453, cited ; *Burtonshaw v. Gilbert*, Cowp. 54 ; *Onions v. Tyrer*, 1 P. Wms. 346 ; *Lord J. Thynne v. Stanhope*, 1 Add. 52. And even where both parts of a will are in the testator's own possession, the destruction of one part *prima facie* destroys the other. But this is a weaker case than the former one. It is of course liable to be rebutted by evidence that there was not *animus cancellandi*, but it lies upon the devisee to set up the will again ; *Pemberton v. Pemberton*, 13 Ves. 303, 308, 310. Even where both parts are in the testator's possession, and he alters one and then destroys that which he has altered, the *presumption* prevails ; but this is a weaker case : S. C. But in all these cases the question of the testator's intention to destroy, and of the completion of the act of destruction by him, properly belongs to a jury ; *Bibb v. Thomas*, 2 Blackst. 1013 ; *Doe v. Parkes*, 3 Barn. & Ald. 429. The statute does not enact that any act of destruction shall revoke a will. If therefore a man having two wills of different dates by him should direct the former to be destroyed, and through mistake the person should destroy the latter, such an act would be no revocation of the last will. Or suppose a man having a will consisting of two parts throws one unintentionally into the fire, where it is burnt, it would be no revocation of the devises contained in such part. It is the intention therefore that must govern in such cases ; *per* Lord Mansfield, Cowp. 52 ; 1 P. Wms. 345, *per* Lord Cowper ; see II. Sugd. Wills, 43, 44. But under the old law there must have been a compliance with the statute : there must therefore, for example, have been a partial burning, although the will was improperly taken off the fire by a third person. *Doe v. Harris*, 6 Adol. & Ell. 209 ; and see 8 Adol. & Ell. 1. And this is still the law. See further, *James v. Roberts*, 3 No. Cas. 309 ; *Allan's case*, id. 640.

other persons, revoked the first will, although the second devise was void in law (*g*), and this rule seems still to prevail, and so do the rules laid down in the case of *Onions v. Tyrer* (*h*).

7. The words, *with the intention of revoking the same*, were not in the statute of frauds, but were added to it by construction (I). This section of the act relates to the destruction of the instrument, to a total revocation; a later section, which we shall presently state, refers to the manner in which its contents may be destroyed. The statute of frauds gave effect to revocations by burning, *cancelling*, tearing, or obliterating the will (*i*). The recent act is confined to burning, tearing, or otherwise *destroying* the same.

8. But where a man cut out his signature from his will, the will was held to be revoked (*k*), for no will is valid without the signature of the testator: it is an essential part, without which a will cannot exist. There would be no doubt that if the name of the testator had been burnt or torn out, the revocation would have been as complete as if the will had been torn into twenty pieces. The entirety of the will was destroyed by the removal of the signature of the testator. And the learned Judge thought that a will might be revoked by cutting with an instrument, as well as by tearing it,

(*g*) *Roper v. Radcliffe*, 8 Vin. Abr. 141; 10 Mod. 233.

(*h*) 1 P. Wms. 342; see the preceding note: *Matthews v. Venables*, 2 Bing. 136; *Eilbeck v. Wood*, 1 Russ. 564; *H. Sugd. Wills*, 41.

(*i*) 29 Car. 2, c. 3, s. 6.

(*k*) *Hobbs v. Knight*, 1 Curt.

768; see 3 Curt. 770; see *Williams v. Jones*, 7 No. Cas. 106, where the testator intended to reconsider his will, and it was found at his death in his bureau, locked up, with the first sheet containing the substance of the will detached and missing, and held to be done *animo revocandi*.

(I) This provision clears up the doubt on the statute of frauds.

if a corresponding effect be produced by the one act as by the other. But it was not necessary, in order to bring the act within the meaning of the words "otherwise destroying," that the material of the will should be destroyed; it was sufficient if the essence of the instrument (not the material) be destroyed. Suppose a will to be written in pencil, and the words were removed by Indian rubber, could there be any doubt that that would be a sufficient revocation? And the learned Judge expressed an opinion that although the term obliteration (*l*) is omitted in this section of the statute, yet if the obliteration amount to a destruction of the will, as where the testator so obliterates his name as to render it impossible to make it out, or if he erases [in like manner] *animo revocandi* the names of the witnesses, the will would be revoked.

9. It has of course been held that cancellation of a will, by striking it through with a pen, crossing out the names of the testator and of the witnesses, is not a revocation, for when the legislature, after mentioning burning a will, and tearing a will, speaks of otherwise destroying a will, they must be understood as intending some mode of destruction, *ejusdem generis*, not an act which is not a destroying in the primary meaning of the word, though it may have the sense metaphorically, as being a destruction of the contents of the will; it never could have been their intention that the cancelling of a will should be a mode of destroying it. The term cancelling was advisedly omitted (*m*).

(*l*) See s. 21, *post*.

(*m*) *Stephens v. Tafrell*, 2 Curt. 458; see *Williams v. Jones*, 7 No. Cas. 106. "The 28th clause gives validity to revocation only by burning, tearing, or otherwise destroying, which words, otherwise

destroying, seem to mean modes of destruction, *ejusdem generis*, as *cutting*, throwing into water, or the like, and therefore to *exclude cancelling*." H. Sugd. Wills, 46. Both points have been so decided.

10. And no obliteration, interlineation, or other alteration made in any will after the execution thereof (*n*) is to be valid, or to have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as before required for the execution of the will; but the will, with such alteration as part thereof, is to be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will (*o*).

11. It was at first decided that where a legacy was so effectually obliterated that it was not apparent, and another was substituted for it, but the alteration was not duly attested, the gift wholly failed, for the words of the statute meant not apparent on the face of the will (*p*). But it was decided in the Privy Council that although the 21st section does not contain, like the 20th section, the words, "with the intention of revoking the same," yet that it must receive the same interpretation, and the old law must prevail: therefore if substitution was intended, and not simply revocation, and from want of compliance with the statutory regulations, the substitution cannot take effect; then the obliteration is not operative, and the will must operate as it originally stood, and evidence *aliunde* is admissible to prove its contents (*q*).

(*n*) See *supra*, s. 1, pl. 44.

(*o*) Sec. 21.

(*p*) Levoek's case, 1 Curt. 906;
Rippin's case, 2 Curt. 332; see 2
Curt. 467.

(*q*) Brooks v. Kent, 1 No. Cas.
93; 3 Moo. P. C. C. 334; Rippin's
case, 3 Curt. 121.

12. But where the obliteration is simply with a view to revocation, and the parts obliterated cannot be made apparent on the face of the will, the revocation will be absolute, and extrinsic evidence, however clear, cannot be received in order to restore the will (*r*).

13. In order to discover the words as they originally stood, the Court will submit the will to the examination of persons accustomed to inspect writings; and it is sufficient if they can be made out with the aid of magnifying glasses (*s*).

14. No will or codicil, or any part thereof, which shall be in any manner revoked, can be revived otherwise than by the re-execution thereof, or by a codicil executed in manner before required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival is not to extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown (*t*).

15. By the first part of this provision, where a will is revoked a codicil duly executed must show an intention to revive it in order to again give it operation. But where a testator having made a will in duplicate, dated 12th May 1837, one part of which was in his own possession, afterwards made a new will, dated 17th October 1838, by which he revoked all other wills, and destroyed the part in the possession of Mr. Meredith, his attorney, by whom both of the wills were prepared, and subsequently he made a codicil, by which he bequeathed an annuity to his sister, and which codicil he

(*r*) *Townley v. Watson*, 3 Curt. 761.

(*s*) *Ibbetson's case*, 2 Curt. 337.
(*t*) *Sec. 22.*

commenced by stating that he wrote it as a codicil to his will made by Mr. Meredith, dated 12th May 1837; *that* will was held to be revived by the codicil. It was considered that the intent to revive that will was clearly shown by the great pains taken to describe it, and the Court could not act upon the mere suggestion of a mistake (*u*).

16. This first part of the provision, which is confined to cases where the will has been previously revoked, renders it expedient in executing a codicil to declare that the intention is to confirm or revive the will. The latter part of the provision renders it necessary in reviving a will to declare that the whole of it is intended to operate unless the testator intends to revive partially only. This portion of the enactment was, it seems, suggested by the case of *Crosbie v. Macdoul* (*x*), but it carries the principle much further, and unless care be taken, may defeat the intention of a testator in reviving his will. A will which is revoked by a later will or codicil, although it is left in a perfect state, cannot be set up by the destruction of the will or codicil by which alone it was revoked. This differs from the old law (*y*). As marriage will by force of the statute revoke a will, a subsequent codicil, although duly executed, will not revive it, "unless it show an intention to revive the same." We should bear in mind that this branch of the statute does not refer to wills not revoked, and therefore an unrevoked will may be republished by a codicil, which would not operate to revive a revoked will. In the former case a codicil duly executed will make the will speak as of the date of the codicil by the effect of

(*u*) *Payne v. Trappes*, 1 Robert.
583; see *Thomson v. Hempenstall*,
7 No. Cas. 141.

(*x*) 4 Ves. Jun. 610.

(*y*) II. Sugd. Wills, 62 — 65;
Major v. Iles, 3 Curt. 432.

republication, unless a contrary intention appear in the latter; a codicil will not revive a revoked will unless an intention be shown to revive it (z).

17. It is further provided by the act (a), that every will re-executed, or republished, or revived by any codicil shall, *for the purposes of the act*, be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived. It has been observed, that the expression *for the purposes of this act*, will give to a republished will the benefits of the act, but it cannot, it should seem, prevent the common operation of a republication as to making the will speak as to the *objects* of the gift as of the date of the codicil, so as in some cases to give interests to persons born after the execution of the will, which without the republication they would not be entitled to. This no doubt would be the case where the will is re-executed, and it seems not open to any reasonable doubt that a codicil by the mere effect of republication or revival will have the same operation where a contrary intention does not appear. It would have required an express provision to take away this operation of republication or revival upon a will not revoked. The law, therefore, upon this point appears to remain unaltered. It is seldom however, it is added, that any alteration in a will can be effected by such a republication, for the *words* of the will are not *altered*, but simply considered as if used at the date of the codicil. There are few cases, therefore, in which republication will alter the destination by the will of any property (b). But a

(z) H. Sugd. Wills, 65, 66.

(a) Sec. 34.

(b) H. Sugd. Wills, 66—69;
Perkins v. Micklethwaite, 1 P.

Wms. 274, where the intention was expressed; Stead v. Berier, 2 Show. 63; Doe v. Kett, 4 Term Rep. 601.

will executed before the statute, giving a legacy to a child of the testator, who died in his lifetime, but after the commencement of the act (*c*), will by the simple act of republication by a codicil executed after the statute came into operation, entitle the legatee to the benefit of the 33d section, and consequently the lapse will be prevented (*d*). And a codicil duly executed will give effect to a will altered after the passing of the act, though the alteration was not duly attested, and though the will itself was executed before 1838 ; that is, it would be a republication of the will in the state in which it then stood, though it could not have effect unless by the retroactive operation of the codicil (*e*).

18. Where a will was executed before the act passed, but by a codicil made after the act came into operation the testator appointed a new trustee, and in all other respects ratified and confirmed the will, the codicil was of course held to amount to a republication, and real estate purchased by the testator after the date of the *codicil* was held to pass ; for the will and codicil were held to constitute a new will, as of the date of the codicil, and that codicil having been executed after the act came into operation, was to be construed by section 24 to speak as if it had been executed immediately before the testator's death (*f*).

19. Where a testator had an estate in great part freehold, and the small residue leasehold, and before the act devised his freehold estate in words which it was held did not pass the leasehold, and made a codicil

(*c*) See *Wild v. Reynolds*, 5 No. Cas. 1, *contra* if child die before the act commenced.

(*d*) *Skinner v. Ogle*, 4 No. Cas. 74 ; *Winter v. Winter*, 5 Hare,

306 ; *Mower v. Orr*, 7 Hare, 473, *infra*.

(*e*) 4 No. Cas. 79, *per Curiam*.

(*f*) *Doe v. Walker*, 12 Mees. & Wels. 591.

after the act which operated as a republication of the will, and after the codicil he purchased the fee of the leasehold, which was conveyed to him, and thereby the leasehold interest merged, it was yet held that this small estate did not pass by the will. How the case would have stood if the acquisition of the fee of the leasehold had been made before the codicil, the learned Judge said it was not necessary to say; but he held that as it was made after the codicil, the act of Parliament had not changed the devolution of the property, and consequently (there being in the will a residuary gift of freeholds and leaseholds) that this leasehold, or formerly leasehold portion, passed under the general residuary gift (*g*). This decision of course was made on the ground that the will by its republication could only pass what by its own force, considering it to speak as at the testator's death, would pass by it: there were in fact two dispositions in the will; one by which the newly acquired freehold, as it was held, could not pass under the words of the will, speaking as at the death; nor would, as it was decided, that devise have passed even the leasehold interest had not that been merged; and another disposition by which the leasehold interest would have passed, and by which the fee simple did pass; for as the codicil had republished the will, the freehold purchased after it of course passed under the general residuary devise in the will.

20. And no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except

(*g*) *Emuss v. Smith*, 2 De Gex & Sma. 722; sec. pl. 24, *infra*.

(*h*) *Doe v. Walker*, 12 Mees. & Wels. 591; see *infra*.

an act by which such will shall be revoked as aforesaid, is to prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death (*i*).

21. And every will is to be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will (*k*) (I).

22. Equity had already partially acted upon the rule that an alienation which, although complete at law, was in reality only a charge, as in the instance of a mortgage, did not affect a prior will as far as the beneficial interest was still left in the testator; but this was open to many exceptions, and where the fee was wholly conveyed to uses, although a reversion was left in the testator and was his old estate, yet the prior will was wholly revoked; and ineffectual conveyances had the same operation. But by this act, whatever interest is left in the testator, without reference to the nature of the conveyance, will pass by the prior will: for example, if he make an appointment under a power, operating to exhaust the power, yet any interest appointed to the testator will pass by the prior will (*l*).

(*i*) Sec. 23.

(*l*) See *Anson v. Lee*, 1 Sugd.

(*k*) Sec. 24; *supra*, pl. 17.

Pow. ; *H. Sugd. Wills*, 51, 52.

(I) This section "declares that every will shall be construed with reference to the real and personal estate *comprised in it*, to speak as if it had been executed immediately before the testator's death. These words, however, cannot, it is apprehended, control the obvious meaning. The construction is, that every will shall so speak with reference to any gift in it of real or personal estate, but it is obvious that very embarrassing questions may arise upon this provision;" II. *Sugd. Wills*, 81.

This is a great improvement, and the clause operates not only on the estate or interest which the testator had when he executed or performed the conveyance or other act subsequently to his will, but also on the estate or interest which the testator had power to dispose of by will at the time of his death; therefore an actual conveyance to a purchaser after the will would not prevent the will from operating on any interest in the estate which the testator might have acquired subsequently, whether by a purchase or otherwise. And as after-purchased estates pass by a will where a contrary intention does not appear, no question can now arise as to the form of a conveyance to the testator after a contract(*m*); and now, where a contract for sale after a will is rescinded or cannot be enforced, the estate will pass by the will, both at law and in equity (*n*).

23. By the rule before the statute, a contract for sale revoked a will in equity, although not at law; and it has been held that this rule is not altered by the statute. The point was one of much nicety (*o*). The devisee, therefore, in such a case, where the conveyance has not been executed, still takes the estate, but simply as a trustee for the executor or next of kin who are entitled to have the contract performed for their benefit.

24. If a man having a term of years contract for the fee, and then devise the estate before the conveyance,

(*m*) See Sugd. Purch. 210.

(*n*) See Sugd. Purch. 210.

(*o*) Farrar v. Lord Winterton, 5 Beav. 1; Moor v. Raisbeck, 12 Sim. 123; Saunders v. Cramer, 3

Dru. & War. 99; 13 Sim. 569; H. Sugd. Wills, 53; Sugd. Purch. 210; Emuss v. Smith, 2 De Gex & Sma. 722.

the equitable fee will pass as before the statute, and the term would attend it (*p*) (I).

(*p*) Sugd. Purch. 196, 207; Concise View, 126.

(1) The following observations are extracted from Sugd. Purch. 11th edit. 207—210, and are inserted here in consequence of their bearing on the construction of the act.

“Whether, if such a purchaser had, previously to the purchase, made his will under the new law, by a general bequest in which the term would have passed, the legatee will be entitled to it, although the bequest be not expressly revoked, is a point of some nicety. The rule of equity, that the term attends the inheritance immediately on the purchase of the fee, still remains; but it must bend to the provisions of the legislature. Now the statute provides that no act done subsequently to the execution of a will of real or personal estate (except a revocation within the terms of the act, which the purchase of the inheritance would not amount to), shall prevent the operation of the will with respect to such interest as the testator shall have power to dispose of by will at the time of his death (s. 23); and that every will shall be construed with reference to the estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appear *by the will* (s. 24).

“Now the rule of equity which denied to the legatee the right to the term, proceeded upon the rule that the term became attendant upon the inheritance, and no longer remained in the view of equity as a term in gross. But the statute, with few exceptions, prevents any act subsequently to the will from operating as an implied revocation of the gift of the estate which the testator has at his death; and although the case we are now considering was not in the view of the legislature, yet the statute *seems* to save the bequest to the legatee for the term of years, because, notwithstanding the subsequent act, viz. the purchase of the inheritance, the will is still to operate with respect to the testator’s interest at his death as far as that is disposed of by the will. But it may be urged that there is no specific gift of the estate, even for the years in the case supposed, and that it would probably be contrary to the intention of the testator that the term, after he has purchased the inheritance, should pass as part of his personal estate. The reply is, that by the statute the question must be, Does a contrary intention appear *by the will*? Now, *the will* only shows an intention to pass all the personal estate, of which this was a part, and at law still is. It may be urged, that by the statute the will is to be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a con-

25. Where a man bequeathed a leasehold estate specifically to trustees, to be held with a freehold estate

trary intention appear by the will ; and therefore that this will must be so construed as no contrary intention appears by it, and consequently it cannot pass the term of years, because, if a lessee for years, having contracted for the inheritance, were to make his will and simply bequeath his personal estate, the term of years would not in equity pass to the legatee. But it may be thought that the clause in question was intended to enlarge and not to restrict the testator's power, and that the case altogether depends upon the previous section. The term was bequeathed by the will as it stood, and the subsequent act is not to defeat its operation.

“ But a still more difficult case may arise. A lessee for years may make his will and give all his personal estate to *A*, and all his real estate to *B*, and afterwards contract for the fee, and then die without republishing his will. At the time he made his will it would have passed the lease to *A*, at the time of his death it will pass the fee to *B*. Is the legatee still entitled to the term? It would, perhaps, be held, that he is not, because it may be said the character of the estate has changed in equity, and as the will by the statute will operate upon the whole fee, no provision of the act would be contravened, and the will would speak and take effect as to the estate, as if it had been executed immediately before the death of the testator ; for *such* a will, executed under such circumstances, immediately before the testator's death, would of course pass the fee to *B*, and the term would attend it. But this is not a clear point, and it might be considered more consistent with the statute to allow the term to pass to the legatee, and the fee (subject to the term) to the devisee.

“ But let us suppose that, in the case originally put, there was, after the contract, a conveyance of the fee to the purchaser, or the term was assigned to attend the inheritance, in either case it seems that the legatee would not take the term ; for, in the first case, the term would have merged by its union with the fee, and no interest in the nature of personal estate would have remained to be acted upon by the will : in the latter case, there would be a new destination of the term ; it would no longer be personal estate of the testator, either at law or in equity ; but at law would belong to the trustee, and in equity would be attached to the inheritance.

“ If the term had been *specifically* bequeathed, the rule before the statute would, we have seen, have been the same. But that circumstance now would make a difference ; not, however, in the cases last supposed ; for an actual conveyance of the fee to the testator merging the term, or an assignment of the term to attend, would have the same

adjoining, which he devised in strict settlement and afterwards purchased the fee, which was conveyed to him, the decree declared "that the bequest of the leasehold was adeemed by the subsequent conveyance of the fee to the testator, and that the estate constituted part of the testator's residuary freehold estates," and they were devised by the will to other uses (*q*). It is singular that the point was not, according to the report, alluded to either in the argument or in the judgment, nor does the reporter's marginal abstract mention it. The decision follows the law before the new act (*r*).

(*q*) *Emuss v. Smith*, 2 De Gex & Sma. 722.

(*r*) *Sugd. Concise View*, 126.

operation, whether the term had been specifically bequeathed, or would have passed under a general bequest.

"But where the term is specifically bequeathed, a *contract* for the fee would not now, it is conceived, defeat the bequest; and if there were a specific bequest of the term to *A*, and a general devise of real estate to *B*, although the latter would pass the fee to *B* by force of the statute, notwithstanding that there was no republication after the contract, yet the bequest of the term would, it seems, remain valid, for the thing itself would still subsist, and the testator, at his death had power to dispose of it; and a similar gift in a will executed immediately before the testator's death would have the same operation; and in this case no contrary intention would appear by the will. Indeed, it will perhaps be contended in such a case that the legatee of the term takes the fee; because the estate is given by the will and the statute supplies words of inheritance (s. 28), and makes the will speak as if executed immediately before the death; but this could not be maintained, because in such a case the term is given to the legatee, which prevents the operation of the clause in the statute vesting the fee, and a contrary intention would appear on the face of the will.

"In considering these questions upon the right of a legatee to a term of years where the termor, the testator, has contracted for the fee subsequently to the will, it will now be necessary to consider also the operation of the 8th and 9th Vict. c. 112, for rendering the assignment of satisfied terms unnecessary; the operation of which act is in terms confined to satisfied terms."

26. Where an estate devised is converted into personality subsequently to the testator's death in consequence of an election to purchase by a person having a right to make such election, the estate, unless devised specifically, would not remain with the devisee, but the produce of it would go to the residuary legatees or next of kin, and this rule, it seems, is not altered by the statute (*s*).

27. Of course where a man before the statute devised an estate by name, and he subsequently purchased an adjoining estate, and by contract gave a right of pre-emption over both estates to another, with an absolute option to purchase for twelve months after the death of the then purchaser, and then the testator by a codicil, after the statute, devised the newly purchased estate by name, and the codicil operated as a republication of the will, and after the testator's death, the person having the option obtained a decree for the sale to him, —it was held that the purchase monies of both the estates belonged to those who would have enjoyed them if the option of buying had not been exercised (*t*).

28. The learned Judge in deciding the case observed, that how this case would have stood if the codicil had not amounted to a republication of the will it was not necessary for him to say, for he was of opinion that the codicil did effect a republication of the will. Again, how this case would have stood if the contract had been an absolute or ordinary contract of sale, binding one party to sell and the other to buy, and not, as it was, a contract merely in the option of the person with whom

(*s*) *Lawes v. Bennett*, 1 Cox, 167; *Townley v. Bedwell*, 14 Ves. 591; *Drant v. Vause*, 1 You. & Coll. C. C. 589; *Sugd. Purch.* 203, 204, 211.

(*t*) *Emuss v. Smith*, 2 De Gex & Sma. 722.

the testator entered into the contract, it remaining uncertain during the whole of the testator's life whether the purchase would ever take place or not, he also need not say. We may observe, that as the devise was made subsequently to the contract and gave the property by description to uses, even if the contract had been for a sale out and out, the purchase money, as it should seem, would have belonged to the devisee (*u*).

29. If a testator devise his estate to trustees to sell, and to pay the money to certain legatees, and afterwards sell the estate himself, this will still, as under the old law, be an ademption (*x*).

30. There are now only four modes in which a will can be revoked, viz. ; 1. By another inconsistent will or writing executed in the same manner as the original will ; 2. By burning or any other act of the same nature ; 3. By the disposition of the property by the testator in his lifetime ; 4. By marriage. By the 1st and 3d of these modes the will may be revoked either entirely or in part, by the 2d and last the revocation will be complete (*y*).

31. Where a will of real estate was executed before the passing of the act, and after the act passed the testator joined in executing a deed which operated as a revocation of the will, it was held that the interest which the testator had in the estate at the time of his death did not pass by his will. As the statute for the first time gave a power to dispose of all estates which a man might have at his death, and made the will as to

(*u*) See Sugd. Concise View, 132. beck, 12 Sim. 123 ; Sugd. Purch. 200, 211.

(*x*) Arnald v. Arnald, 1 Bro. C. C. 401 ; Kinbold v. Roadknight, 1 Russ. & Myl. 677 ; Moor v. Rais- (*y*) Real Property Commissioners' 4th Report ; II. Sugd. Wills, 60.

the disposition of real estate speak as at the testator's death, it followed that no alienation or alteration of estate ought to affect the devise of an estate so far as the testator at his death had any interest in the estate to answer it. But as to wills executed before the 1st January 1838, which had no such operation and were excluded from the act, it would have been inconsistent to give to a revoked will an operation over a new interest acquired subsequently to the will, which it would not have had over the same interest if the will had remained unrevoked (z).

(z) Lord Langford *v.* Little, 2 Jo. & Lat. 613.

SECTION III.

OF THE PROPERTY WHICH MAY BE DISPOSED OF BY WILL: AND OF
THE OPERATION OF RESIDUARY AND GENERAL DEVISES.

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|---|---|
| 1. <i>What estates may be disposed of by will.</i> | 9. <i>Devise of mines, &c.</i> |
| 2. <i>Will speaks as if executed immediately before death.</i> | 10. <i>Lapsed and void devises to pass to residuary devisee.</i> |
| 3. <i>Contingent interests, hopes of succession, copyholds without surrender, after-acquired property, &c., pass.</i> | 11. <i>Effect of death of a residuary devisee.</i> |
| 4. <i>Nature of contingencies.</i> | 12. <i>Operation of clause on charges on real estate.</i> |
| 5. <i>Devise by joint-tenant.</i> | 13. <i>General devise includes copyholds.</i> |
| 6. <i>Quasi tenant in tail cannot devise.</i> | 14. <i>Wilson v. Eden.</i> |
| 7. <i>Effect of ademption on specific legacy.</i> | 15. <i>General devise an execution of a general power of appointment.</i> |
| 8. <i>Testator's intention still to rule: devise of land of which he is now seised.</i> | 16. <i>Operation of statute on powers to the survivor of several persons.</i> |

Of the property which may be disposed of by will.

1. Every person (a) may devise, bequeath, or dis-

(a) Sec. 3.

pose of, by his will executed in manner after required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, *at the time of his death*, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir at law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and this power extends to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if the act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will, or a surrender to the use of a will, should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in the act, if the act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respec-

tively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will (I).

(I) By sec. 4, it is provided, that where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid. By sect. 5, it is enacted, that when any real estate of the nature of customary free-

2. And, as we have already seen, every will is to be considered, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will (*b*).

3. And now a will may pass all property, legal as well as equitable, and contingent as well as vested in-

(*b*) Sec. 24 ; *Gibson v. Hale*, 17 Sim. 129.

hold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor ; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will ; and when any such real estate could not have been disposed of by will if the act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall as against the devisee of such estate have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent. And by sect. 6, it is enacted, that if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple ; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant ; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of the act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

terests, even a hope of succession, if it be realized in the testator's lifetime, and also rights of entry and copyholds as well as freeholds, and whether there is any custom to devise them or not, and although the devisor shall not have surrendered the same to the use of his will, or shall not have been admitted, and estates *pur autre vie* as well as fee simple estates. And all such estates, rights, and interests pass, although the testator became entitled to them subsequently to the execution of his will (c). And thus all questions as to the nature of and right to devise copyhold or customary estates, or estates *pur autre vie*, or as to the effect of renewal of leases devised, have been set at rest, and a man may dispose by his will of what he may live to become entitled to, as heir at law or personal representative, or devisee or legatee of a person living at the date of his will.

4. It has been observed that contingent executory or other future interests may be devised. If a contingency upon which a testator may become entitled to any property depend on his being alive upon the happening of a given event, the property, if devised, will pass under the 3d and 24th sections, without reference to the existence of the contingency at the date of the will. But if the contingency depend wholly upon a collateral event not connected with the testator's life, and it do not happen in his lifetime, it will then pass as a contingent interest under section 3, as it would have done prior to the statute (d). It is no longer necessary that the testator, when he devises a contingent interest, should be ascertained as the person or

(c) Sugd. Purch. 206.

(d) *Roe v. Jones*, 3 Term Rep. 88; *Doe v. Tomkinson*, 2 Mau. & Selw. 165.

one of the persons in whom the same may become vested. But this clause can rarely operate beyond the power given to devise future property, because in the given cases the testator is required to be living upon the happening of the event provided for. A hope or chance of succession not realized in the testator's lifetime will not pass by his will. The will would, however, pass it if it dropped in his lifetime, although after the date of his will (*e*).

5. But the property of which a man is empowered to give by will is only that which if not so given would devolve upon his heir or executor. A joint-tenant still cannot devise so as to affect the rights of his co-tenant, but his will would pass the share subsequently allotted to him in case a severance take place; or if not, and he should be the survivor, the entire estate would pass by the will (*f*). A joint tenancy in copyholds may still be severed by a surrender to a will, although no such surrender is now required to give operation to a will (*g*).

6. But the estate of a tenant in tail, or *quasi* tenant in tail, does not fall within the power in the act, as the issue would take as heirs of the body and not as heirs at law, &c., and therefore the entail must be barred to give effect to the will. The will, however, may precede the barring of the estate tail.

7. It is said that a specific legacy of any sort will not be defeated by the loss of the subject of the gift if a similar subject is vested in the testator at his death, as if a testator were to give his three per cent. consols

(*e*) H. Sugd. Wills, 136; and see the exceptions in sec. 33 of the act.

(*f*) H. Sugd. Wills, 79.

(*g*) *Gale v. Gale*, 2 Cox, 136.

to one, and then sell them, and afterwards purchase others, the latter would pass just as if the will had been made after they were purchased (*h*). This may be correct in many cases, but it will not hold as an universal rule. In *Emuss v. Smith* (*i*) the Vice-Chancellor said, "Suppose a man to have a brown horse, and bequeath it, and then to sell it and buy another brown horse, and die, does the horse which he was possessed of at the time of his death pass?"

8. The qualification in section 24 to the general operation of the act, by the words "unless a contrary intention shall appear by the will," leaves the meaning of the testator to be collected according to the usual rules of interpretation. If, therefore, a testator confines his gift to the property "of which he is *now* seised," and manifestly uses the expression with reference to the period when he makes his will, the devise will have no extended operation (*k*).

9. It has been held that a devise before the statute of an estate (save and except the pits and veins of clay therein which were devised by the residuary devise thereafter contained) to uses, and then a devise of the pits and veins of clay in and upon his lands, with the residue of his estates to different uses, passed only the pits and veins of clay which at the date of the will were being worked under a lease mentioned in the decree (*l*). The reporter adds a *quære*, whether since the statute such a devise would pass pits or veins open at the death of the testator. As the devise was generally of the pits and veins of clay, it would

(*h*) H. Sugd. Wills, 81.

(*i*) 2 De Gex & Sma. 733.

(*k*) *Cole v. Scott*, 16 Sim. 259;
1 Mac. & Gor. 519; see *Harris v.*

Davis, 1 Coll. C. C. 416, as to a failure of issue.

(*l*) *Brown v. Whiteway*, 8 Hare, 150.

seem that under the provisions of the act pits and veins opened by the testator after his will would pass by it.

10. Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will (*m*). Of course a contrary intention cannot be collected from the circumstance that certain portions of an estate are given to uses which fall within the provisions of the act, and the remaining portion only to the residuary devisees; but the residuary devisees will take the whole (*n*).

11. Where a devisee of the residue, or of a portion of the residue, dies in the testator's lifetime, of course a lapse takes place; for, in the first case, there is none but the heir to take; and in the second instance, where the residue is given to several as tenants in common, the share of one who dies in the testator's lifetime cannot survive to the others; it would be otherwise if they took as joint-tenants. It should be kept in view that there are cases in which the act prevents a lapse, to which our attention will in a subsequent page be drawn.

(*m*) Sec. 25; *Culsha v. Cheese*, 7 Hare, 236; *qu.* and consider the case.

(*n*) *Culsha v. Cheese*, 7 Hare, 236. Looking at the statements

and frame of the widow's will, there can be no serious doubt that the estate was well devised on the face of the will: the question of lapse is a distinct point.

12. Whether this clause will be held to include charges on real estate, which would otherwise lapse, remains to be decided. It is a question of much difficulty.

13. And a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will (*o*).

14. Where a devise was considered as a devise of all the testator's land, or all his lands, farms, and messuages, and other real estate, and the word land had thus its ambiguity removed, and by reason of the words "other real estate" would be limited to its original and proper legal meaning, it was held that the devise was not affected by the 26th section of the statute: it was not simply a devise of the testator's land, or of his land in a particular place, or in a particular occupation, or a devise in a general manner applicable to any land, whatever might be its quality, or the testator's estate or interest in it; neither was it a devise which would describe a leasehold estate if the testator had no freehold estate which would be described by it (*p*).

(*o*) Sec. 26.

(*p*) *Wilson v. Eden*, 11 Beav. 297.

15. A general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner, a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, unless a contrary intention shall appear by the will (*q*).

16. This provision, which introduces in many cases a new rule, only applies to a general power of appointment; and where the testator has such a power, a general devise or bequest unexplained will pass not only his property, but also that over which he has a power. And if the testator can appoint to whom he thinks proper by will, it is unimportant that he is by the power prevented from exercising it by deed (*r*). The law remains unaltered where the power is a special one, confined to certain objects (*s*), for example, the testator's children (*t*). And it seems doubtful whether, where *such* a power is limited to the *survivor* of several persons, it can be exercised until some person

(*q*) Sec. 27.

(*r*) H. Sugd. Wills, 84.

(*s*) 1 Sugd. Pow.

(*t*) *Cloves v. Awdry*, 12 Beav. 604.

fills the character of survivor(*u*). Although where the power is a general one, it may, it seems, be executed by any by will; and if the testator become the survivor, the power will be well executed (*x*). And a general power of appointment created after a will, but in the testator's lifetime, may, it should seem, be deemed to be executed by the will, if the will would have operated to execute the power, had it been in existence at the date of the will (*y*).

17. The enactment in section 6, which provides for the disposition of estates *pur autre vie*, where not disposed of by will, should be kept in view, as also should the provisions as to copyholds, and the fines and fees payable in respect of them.

(*u*) 1 Sugd. Pow. (*x*) II. Sugd. Wills, 84. (*y*) *Id.* 86.

SECTION IV.

WHERE WORDS OF LIMITATION SHALL BE SUPPLIED, AND OF THE CONSTRUCTION OF THE WORDS "DIE WITHOUT ISSUE," &c.; OF DEVICES TO TRUSTEES, AND OF LAPSE.

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| <p>1. <i>Devise carries the fee without words of limitation.</i></p> <p>2. <i>To what property it extends.</i></p> <p>3. <i>Devises with words of limitation.</i></p> <p>4. <i>Operation of statute.</i></p> <p>5. <i>"Die without issue," &c., to be confined to a failure of issue in the lifetime or at the death.</i></p> <p>6. <i>Unless a contrary intention appear.</i></p> <p>7. <i>Construction of the enactment.</i></p> | <p>8. <i>Cases excepted by the proviso: probable operation in various cases of the enactment.</i></p> <p>9. <i>Harris v. Davis.</i></p> <p>10. <i>In re O'Beirne.</i></p> <p>11. <i>Devise to trustees to pass the fee unless a definite term or an estate of freehold be given; s. 30.</i></p> <p>12. <i>Devise to trustees without words of limitation to pass the fee, where; s. 31.</i></p> |
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| <p>13. } Construction of the 30th section.
 14. }</p> <p>15. And of the 31st.</p> <p>16. Devises of estates tail not to lapse.</p> <p>17. What issue must be living at testator's death to prevent a lapse.</p> <p>18. Gift to children or other issue not to lapse.</p> <p>19. What issue must be living to prevent the lapse.</p> | <p>20. Property in last case belongs to deceased legatee.</p> <p>21. No lapse although child die before will.</p> <p>22. Does not extend to an appointment where the property is settled in default of appointment.</p> <p>23. Particular devises failing by lapse, to go to residuary devisee.</p> <p>24. Administration of assets not altered by the act.</p> |
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1. WHERE any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will (*a*).

2. This provision, according to the meaning imposed upon the words "real estate" by the 1st section, extends to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and it therefore extends to personal hereditaments: for example, an annuity granted to a man and his heirs (*b*), or an annuity granted by the Crown out of the Barbadoes duties (*c*); and of course to estates

(*a*) Sec. 28.

(*b*) Co. Litt. 2 a, 20 a.

(*c*) Earl of Stafford v. Buckley,

2 Ves. 170; Countess of Holder-

nesse v. Marquis of Carmarthen, 1

Bro. C. C. 177; Austin v. Daley,

4 Barn. & Ald. 614.

pur autre vie, whether granted to the devisor and his heirs, or to him and his executors and administrators for the lives, for even in the latter case the estate is freehold (*d*).

3. The act would not apply to any devise with any words of limitation, but they must operate by their own force. The enactment was a great boon, and puts an end to many refined distinctions. It is unimportant whether the devise is of an estate vested in the devisor, or is in exercise of a power vested in him; and the act would equally apply to a power *created* by will, and would, just as in a devise of an interest, supply words of limitation in fee, so as to enable the appointor to confer the fee. Thus a devise by will of a house to such persons generally, or to such children of *A* as he shall appoint, will give to him a power over the fee; so a devise of a house to *A* to the use of such persons generally, or to such children of *B* as he shall appoint, will give the fee to *A* to serve the power, and the power will be as extensive as the gift and consequently *B* may appoint the fee (*e*).

4. The enactment applies to every devise "to any person without any words of limitation;" and where the devise is without any gift over, whether immediate or in remainder, it would operate without raising any difficulty; for it can admit of no distinction whether the devise is to *A*. without any words of limitation, or to *A*. for life, remainder to *B*., without any words of limitation. But a question has been raised whether this branch of the act would not apply to devises where,

(*d*) See *Doe v. Robinson*, 8 Barn. & Cress. 296; *Oldham v. Pickering*, Carth. 376; *Campbell v. Sands*, 1 Sch. & Lef. 281; *Ripley v. Wa-*

terworth, 7 Ves. 445, 451, 453; II. Sugd. Wills, 94.

(*e*) 1 Sugd. Pow. 503; II. Sugd. Wills, 89.

after the devise without any words of limitation, there are gifts over; and its probable operation in such cases is discussed (*f*). Such cases, however, were clearly not within the purview of the act, and it would be dangerous to extend it to them.

5. In any devise or bequest of real or personal estate, the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime, or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue or otherwise; provided that the act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue (*g*).

6. This important clause, which was intended to put an end to the distinctions in the books where such words as "die without leaving issue" or the like were introduced in wills, provides, that the old law shall remain where an intention appears by the will contrary to the provision in the statute. And the act assumes that such an intention will appear where the person

(*f*) H. Sugd. Wills, 90—93.

(*g*) See. 29; see *Doe v. Ewart*, 7 Adol. & Ell. 665.

whose issue is to fail has a prior estate tail [under, it should seem, some prior instrument], or there shall be [no doubt in the will] a preceding limitation to such person or his issue in tail, but not arising from any implication from the words "die without issue," &c. or otherwise, that is, I presume, unless it shall by the will otherwise appear.

7. To bring the latter part of this branch of the act into operation, the words as to failure of issue must, it should seem, in construing the clause, be open to either of two meanings,—either a want or failure of issue in the lifetime or at the time of the death of the person in question, or an indefinite failure of issue; in which case the statute compels us to adopt the first of these meanings, unless a contrary intention appear by the will; but the statute appears itself to have fixed the import of the words "die without issue" or "die without leaving issue" or "have no issue," to be either a limited or an indefinite failure of issue, unless a contrary intention is shown by the will.

8. The proviso should, it seems, be read thus: the act shall not apply to cases where such words as aforesaid import if no issue described in a preceding gift [in the will] shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift [in the will] to such issue (I).

(I) This section, 29, is said to be ambiguously framed; see the observations in *H. Sugd. Wills*, 96—107, where the probable operation of the section on various reported cases before the statute is considered. The contents of this note are extracted from that work.

There appears to have been no sufficient reason for extending the new rule to real estates; and perhaps it will not often effect the testator's intention. In the common case of a devise of a real estate to one gene-

9. Where leaseholds were given to several persons as tenants in common, or to their lawful heirs, "and

rally, and if he die without issue over, that was a clear estate tail. But now the words "if he die without issue," will, it seems, not create an estate tail, because it may be said they import, under the general provision in the statute, a failure of issue at the devisee's death, and a contrary intention will not be held to appear by the will, because "the preceding gift is not a limitation of an estate tail, without the implication arising from the words, if he die without issue." It may be held that as the first devise is without any words of limitation, the devisee will take the fee under the statute, and then the gift over will be an executory devise; but this is directly contrary to the intent, which it may be argued otherwise appears by the will, for the testator's intention is not manifested by the statute, although his words are expounded by it, or a forced construction is put upon them.

In a case somewhat similar, that is, a devise to A. for life, and if he die without issue over, the latter words will, it seems, mean, by the act, in case he dies without issue living at his death, although before the act they gave a clear estate tail. How is the act to operate in this case? The devisee for life cannot, under the act, take the fee, because the devise to him is with words of limitation: he cannot take an estate tail, because the statute confines the operation of the words "die without issue" to a failure of issue living at his death, nor any interest beyond his life estate. The gift over, however, will not take effect unless there happen to be a failure of issue at the death of the tenant for life, so that the old settled law, which, by putting a rational construction on the words, did effect the intention of the testator, being now altered, that intention will be disappointed, without any assignable cause, and an estate will, in many cases, go to the heir at law, or the residuary devisee instead of the devisees, for whom it was really intended. The shortest mode of setting this right would probably be to restore the old law.

The distinction in *Forth v. Chapman* (1 P. Wms. 663) was complained of, where a man gave freehold and leasehold estates to a nephew, and if he should depart this life, and leave no issue of his body over, and it was held, treating the gifts as if separate ones, that the devisee took an estate tail in the freeholds, with a regular remainder over, and the absolute interest in the leaseholds, with an executory gift over, if he had no issue living at his death. Now this effected the intention of the testator, so far as the law could, or under the new statute can, give effect to it. The words were originally held to give an estate tail in the freeholds, because the issue could take them, and the remainder over, if not barred, would take effect whenever the estate tail determined. The gift over is not inoperative, but may be defeated (see 36 Hans. 981). If we try the

in case there being no heir, then the share or shares to be divided in equal parts amongst the surviving

recent statute by this case, we shall find it has no operation on the gift of the leaseholds. It does not vest them in the issue, for whom the testator really intended them, but leaves them in the devisee himself; and it does not act upon the gift over, for the law had already restrained its operation to a failure of issue at the devisee's death, because the issue themselves could not take. But it does alter the rule as to the freeholds, which was quite right, and applies an erroneous rule to them. For where the parent, the devisee, took an estate tail, the issue would take, if he allowed the estate tail to remain unbarred, and, to defeat them, he must have barred it; but now, if the first devisee takes a fee, they can only take by a new gift from him, or by descent. If he do not take the fee, still more violence is done to the intention, and the new rule will not even carry the estate to the remainder-man in the event really provided for, viz. a failure of issue, whenever the same shall happen. In the most favourable view, the statute applies an inapplicable rule to a case for which the law had already properly provided.

There are many cases to which the rule will not apply, although within the principle. *Brouncker v. Bagot* (1 Mer. 271) appears to afford one example, where a gift of real estate carrying an estate tail contrary no doubt, in one view, to the intention, a gift of leaseholds by reference to the limitations of the freeholds was held to vest the whole interest in the leaseholds in the first tenant in tail of the freeholds, although it was clear that the testator intended all the gifts to take effect in succession. That case would still be decided in the same way.

So in the case of *Elton v. Eason* (1 Mer. 670, cited), where freeholds and leaseholds were devised to the testatrix's son for life, and afterwards to the heirs of his body, if any, and in default of such issue, to her grandson, it was decided that the son took the absolute interest in the leaseholds, and therefore that as to them the gift over had no operation; and the case, if it were again to occur, must still be so decided; for the statute does not operate where a contrary intention appears by the will, by reason of the preceding gift (as in this case) being without any implication arising from such words (*die without issue*), a limitation of an estate tail.

The act would reverse the decision in *Bigge v. Bensley* (1 Bro. C. C. 137; *Donn v. Penny*, 1 Mer. 22). There personal estate was bequeathed by the testator to his wife, her heirs, executors, administrators and assigns for ever; and in case of her death without issue he gave the whole over, and the gift over was held void. But now the words, "and in case of her death without issue," would mean a failure of issue at her death, and if that event happened the gift over would take effect.

legatees," it was decided that the legatees took *quasi* in tail, and one of them having died in the lifetime of the testator without issue, his share lapsed, the gift over being too remote, for the words meant an indefinite failure of issue, and the words "surviving legatees" meant other legatees; and it was held that this case did not fall within the 29th section, which we are now considering, nor within the 24th section, which makes every will speak as to the property com-

So in *Doe v. Ellis* (9 East, 332), a devise of land to the testator's son, his heirs and assigns for ever, but in case his son should die without issue, then over, was held to be an estate tail in the son; whereas now, by the statute, the words, "die without issue," would mean a failure of issue at his death; the fee, therefore, to the son would not be cut down to an estate tail, and the gift over would take effect if the son died without issue living at his death.

In *Byfield's case* (1 Vent. 231), a devise to *A.*, and if he dies not having a son, then to remain to the heirs of the testator, was held to be an estate tail in *A.*; and in *Robinson v. Robinson* (1 Burr. 38), a devise to *A.* for life, and no longer, provided he altered his name, &c., and after his decease to such son as he should have, taking the testator's name, and for default of such issue over, was also held to vest an estate tail in *A.* in both cases principally upon the words introducing the gift over. The operation of the act in such cases is not very obvious. There seems reason to suppose that this provision will render many titles insecure.

The real blot does not seem to have been hit. The construction of the words, "die without issue," or the like, as applicable to real estates, ought not to have been disturbed; but if so dangerous an experiment must be made, the alteration should have been confined to leaseholds and personal estate, and might have provided that the words as to chattels and personal estate should be received in a confined sense, where an intention of the testator to the contrary did not appear; and that where the words of gift vested the absolute property in the legatee, and not in the issue, contrary to the intention, yet the words introducing the gift over should be construed in a confined sense, so as to carry over the property according to the intention, in case the event happened upon which it might by law be given over, viz. the failure of issue at the death of the legatee.

prised in it, as if it had been executed immediately before the death of the testator (*h*).

10. A bequest since the act to my brothers John and James, equally, with a request to John that should he die without lawful issue, the property bequeathed to him should revert back to the sons of James, was held not to give to John a moiety of the property absolutely, although before the statute the words introducing the bequest over would by implication have given to John an estate tail in real estate, and therefore the absolute interest in personalty. The Court observed, that the 29th section altered this state of the law. If the section had stopped at the words, "and not an indefinite failure of issue," this being a gift over in case John should die without issue, which words may import either of the two constructions mentioned in the act, it is plain that they must be construed to mean a failure of issue at the time of the death of John. But then come the words, "unless a contrary intention shall appear by the will, (first) by reason of such person having a prior estate tail; or, (secondly) of a preceding gift being without any implication arising from such words, a limitation of an estate tail to such person or issue; or, (thirdly) otherwise." If a gift is to a man in tail, and for want of issue over, there the contrary appears, for the whole line of issue is provided for by the antecedent gift, and the words introducing the gift over must refer to the same interest; therefore in such a case the words, "for want of issue," mean an indefinite failure of issue. So if upon the true construction of the will, without making use

of any implication arising from the words introducing the gift over, the first taker takes an estate tail, the words will equally import an indefinite failure of issue. But we are not to infer an intention from the use of the very words ; therefore, if there be a gift to one for life, and if he die without issue over, there a contrary intention does not appear ; for in such a case the supposed estate tail is an estate arising by implication only from the use of those very words. In the case itself before the Court, supposing that it were a devise of real estate, John would not take an estate tail unless by implication arising from those very words ; therefore the case did not fall within the exception in the act. Then as to the words “ or otherwise,” there was nothing to show “ otherwise ” an intention that John should take an estate tail, for no such intention is to be collected from the will, except from the indefinite use of the words introducing the gift over, and which the act excludes from consideration (*i*).

11. And where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication (*k*).

12. And where any real estate shall be devised to a trustee, without any express limitation of the

(*i*) *In re O'Bierne*, 1 Jo. & Lat. 352.

(*k*) Sec. 30.

estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied (*l*).

13. These clauses are singularly framed, and are open to much observation (*m*). Section 30 enacts that every devise of real estate (except of a presentation to a church, which exception it was not necessary to introduce in section 31) to a trustee or executor shall pass the fee or the whole estate of the devisor unless a *definite* term of years absolute or determinable or an estate of freehold is thereby given expressly or by implication: it makes no mention of an *indefinite* term. So far is clear that it prevents the creation, expressly or by implication, of such an interest as that in Cordal's case (*n*), where a devise to executors for the payment of debts, and until the debts were paid, with remainders over, was held to give the executors but a chattel, which would go to the executors of the executors. This section may not be thought to apply to cases like Doe v. Simpson (*o*), where trustees by construction or implication were held to take both an immediate estate of freehold for the lives of the annuitants in the

(*l*) Sec. 31.

(*n*) 8 Rep. 96 a; Cro. Eliz. 315;

(*m*) See H. Sugd. Wills, 119—
135; 2 Jarm. Wills, 229.

Co. Litt. 42 a; Carter v. Barnadiston, 1 P. Wms. 509, 518.

(*o*) 5 East, 162.

will, and a term of years in remainder sufficient for the payment of a sum in gross given by the will; for although an indefinite term was thus created, yet an estate of freehold was also created. But the Courts should be astute to put a favourable construction on this provision. If it should be found necessary to bring such cases as *Doe v. Simpson* within its range, it might be held that the act applies where one of the two required estates is given in conjunction with the interest which it was the manifest intention to exclude.

14. This section 30 does not, like the succeeding section, speak of any limitation of the estate, but generally of a devise to any trustee or executor to whom a definite term of years or an estate of freehold is not given, nor does it refer to the nature of the trusts. And the term which is to prevent the operation of the statute may be absolute or determinable, and therefore it does not seem to disturb such limitations as those in *Boraston's case* (*p*), where the gift to trustees is by way of exception out of a gift to an infant at twenty-one, in which case the infant takes a vested estate, and the trustees take a chattel interest: for it does not seem to apply to a case where the duration of the term admits of being ascertained by reference to a date, *e. g.* where a devisee, if he live, will attain twenty-one (*q*).

15. The other section provides that trustees shall take the fee where there is no *cestui que trust* for life, or where there is one, but the trusts may continue

(*p*) 3 Rep. 19; *Mansfield v. Dugard*, 1 Eq. Ca. Abr. 195; *Goodtitle v. Whitby*, 1 Burr. 228; *Doe v. Lea*, 3 Term Rep. 41; *Warter v.*

Hutchinson, 1 Barn. & Cress. 721; 2 Bro. & Bing. 349.

(*q*) *Doe v. Nicholls*, 1 Barn. & Cress. 336; *H. Sugd. Wills*, 130.

beyond his life. This was levelled at such cases as *Doe v. Simpson*, where, departing from the simplicity of the law, the Courts undertook to remodel men's wills, and to introduce unusual limitations, with a view of confining the trustees to such a portion of the legal estate as would answer the precise objects of the testator (*r*). These decisions produced great confusion in the law, and rendered it impossible to advise with confidence on titles depending upon such devises, although the Courts themselves appeared desirous of restoring the old rule (*s*). Although this section is not free from ambiguity, yet it would seem that such cases as *Doe v. Simpson* would, as it was intended they should, fall within its operation; for although, in that case, for example, the devise was to the trustees, and the survivor of them, and the executors and administrators of such survivor, yet that devise, although it might well have been held to carry the fee, may be treated as a devise without any express limitation of the estate to be taken by the trustees, and so may any other devise, where, although words of limitation are used, the Courts, before the act, would not have treated them as amounting to an express limitation of the estate to be taken by the trustee, but would have felt themselves at liberty to cut down or modify the limitation by the supposed quantity of estate required for the execution of the trusts. Where

(*r*) 5 East, 162; *Heardson v. Williamson*, 1 Kee. 33; *Hawker v. Hawker*, 3 Barn. & Adol. 337; 1 Sugd. Pow. 127; see *Doe v. Harris*, 2 Dowl. & Ry. 76; *Glover v. Monckton*, 3 Bing. 13; *Doe v. Martyn*, 3 Barn. & Cress. 513; see *Doe v. Edlin*, 4 Adol. & Ell. 582.

(*s*) *Doe v. Willan*, 2 Barn. & Ald. 34; *Doe v. Field*, 2 Barn. & Adol. 564; *Doe v. Walback*, *id.* 554; *Houston v. Russell*, 6 Barn. & Cress. 403; 5 Russ. 123.

the legal estate in the trustee is measured by the life of a *cestui que trust*, the statute does not operate.

16. Where any person to whom any real estate shall be devised for an estate tail, or an estate in quasi tail, shall die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appear by the will (*t*). This enactment corrected a serious evil: under the old law even a codicil amounting to a republication of the will, would not operate to vest the estate in the issue (*u*). The issue do not take, it will be observed, by way of substitution, but in the same manner as if the devisee had survived the testator, and the estate tail by his subsequent death had descended to his issue; but the devisee could do no act to affect the right of his issue.

17. It has been contended upon the true and grammatical construction of this clause, that it requires some of the issue of the devisee who are living at *his* death, to be also living at the death of the testator in order to prevent a lapse (*x*). This no doubt was not the intention of the framers of the act, and the Courts would probably struggle effectually to read the words, “and any such issue shall be living at the time of the death of the testator,” as not being confined to the issue living at the devisee’s death, but as including any issue who would be inheritable under such entail.

(*t*) Sec. 32.

(*u*) *Doe v. Kett*, 4 Term Rep. 601.

(*x*) H. Sugd. Wills, 113—115.

18. And where any person *being a child or other issue of the testator* to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any *such* issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will (*y*).

19. This provision against lapse is confined to gifts to a child or other issue of the testator: it is not like the preceding clause open to any doubt as to the class of issue who must be living at the death of the testator in order to prevent a lapse, for it expresses what, looking at the object of the framer, it was no doubt intended to express, that some of the issue living at the death of the devisee or legatee must also be living at the testator's death (*z*).

20. But here, unlike the case of an estate tail, the devisee or legatee, although he die in the lifetime of the testator himself, takes the property, and may dispose of it by his will from his issue, who do not take by way of substitution (*a*).

21. Where a bequest was made after the act came into operation to a child of the testator, who died before the will was made, but after the act came into operation, it was decided that no lapse took place (*b*).

(*y*) Sec. 33.

(*z*) 11. Sugd. Wills, 115.

(*a*) This is fully discussed in 11. Sugd. Wills, 103-113; Johnson v. Johnson, 3 Hare, 157.

(*b*) Winter v. Winter, 5 Hare,

306: in fact, the will was made before the act came into operation; then the child died, and the testator republished his will: Mower v. Orr, 7 Hare, 473; *supra*, s. 2, pl. 17.

22. But where the testator has but a power of appointment, and in default of appointment the property is settled on others, a gift by him of this property to a child or other of his issue, although authorised by his power, will be defeated, and the property will go as in default of appointment, if the legatee die in his lifetime, for such a case does not fall within the provisions of the act (*c*).

23. We have before referred to the provision in the act by which gifts by will of real estate, or any interest therein, which fail by reason of the death of the devisee in the lifetime of the testator, are included in any residuary devise contained in the will (*d*).

24. This chapter may be closed with the observation that the act does not interfere with the mode of administering assets; therefore, where part of the purchase money of an estate was borrowed and was a lien on the estate, it was held that the devisee was entitled to the aid of the personal estate, and of a descended real estate, to pay off the charge; but of course that he could not go against any real estate particularly given which was not subject to the lien (*e*).

(*c*) *Griffiths v. Gale*, 12 Sim. 354.

(*d*) Sec. 25 of the act; *supra*, s. 3, pl. 10.

(*e*) *Emuss v. Smith*, 2 De Gex

& Sma. 722: there was no descended estate, but there was real estate devised with the residue, besides devises of particular estates to others.

CHAPTER VIII.

OF TRUSTEES AND MORTGAGEES: 13 & 14 VICT. c. 60.

1. *Repeal of former acts : acts unrepealed.*

I. *Of lunatic and infant trustees or mortgagees.*

2. *Power of Lord Chancellor over trust and mortgage estates of lunatic : contingent rights : stock : choses in action.*

3. *Like power in regard to infants.*

4. *Infant's money to be paid into Court.*

II. *Of trustees out of jurisdiction or the like.*

5. *Power of Court where trustee out of jurisdiction or cannot be found : contingent rights.*

6. *Or uncertain which of several trustees survived.*

7. *Or not known whether last-known trustee is living or dead.*

8. *Or trustee has died intestate without an heir, or his heir or devisee shall not be known.*

9. *Contingent rights in unborn persons may be released.*

10. *Power where trustee refuses, &c., to convey.*

11. *After decree for sale for debts of a deceased person, every person claiming under him a trustee.*

12. { *Powers under 1 Will. 4, c. 47,*
13. { *not repealed : how surplus money to go.*

14. *Extension of last act by 11 & 12 Vict. c. 87.*

15. *After decree for a conveyance, &c., parties may be declared trustees.*

16. } *Provisions in regard to stock*
17. } *and choses in action.*

18. *Where decree may be made in absence of trustee.*

III. *As to mortgages.*

19. *Mortgagee out of possession dead, and money paid to person entitled, cases in which Court may make vesting order, or person may be appointed to convey.*

20. *How copyholds are to be assured.*

21. *Allegations in order made conclusive evidence.*

22. *Provision in 1 Will. 4, c. 60, as to mortgages.*

23. *Escheat, &c., saved by 4 & 5 Will. 4, c. 23 : mistake in that act.*

24. *Provision in 1 & 2 Vict. c. 69, as to mortgages : proviso in act.*

25. *Operation of new act on infant heir of mortgagee.*

26. *Mortgagee out of jurisdiction not affected.*

IV. *As to escheats of trust estates or mortgages.*

27. *No escheat or forfeiture to affect estate of trustee or mortgagee except as to beneficial interest.*

28. *Operation of 1 & 2 Vict. c. 69, on mortgages.*

29. } *Whether new act supplies in*
30. } *all cases the want of an heir*
31. } *of a mortgagee.*

32. *Old provisions as to escheat, &c., repealed: new ones prospective only.*

33. *7 & 8 Vict. c. 79, s. 9, repealed.*

V. *Appointment of new trustees.*

34. *Power in Court to appoint new trustees.*

35. *Extended to charities.*

36. *Parties may proceed by claim.*

37. } *Observations on the policy of the*
38. } *act as regards this head, and*
38. } *of its operation.*

39. *To what extent trustees may be appointed under powers.*

40. *New trustees may be appointed after the death of both, although the power contemplates concurrence of survivor.*

41. *So a vacancy may be supplied on the removal of a surviving trustee.*

42. *A continuing trustee may exercise a power given to the survivor.*

43. *Where the power is annexed to the office.*

44. *Executors who act may exercise a power to executors.*

45. *Common power in will does not apply to the death of a trustee in testator's lifetime: sed qu.*

46. *Several classes of trustees: power confined to some.*

47. *Bankruptcy of trustee an unfitness.*

48. *Marriage articles: by whom trustees to be appointed.*

49. *Where the trustee may make his devisees, trustees.*

50. *One trustee cannot be appointed, contrary to intent, in the place of two.*

51. *More than one may be appointed in the place of one; semble.*

52. *Sandys v. Nugee: D'Almaine v. Anderson accordingly.*

53. *Ex parte Daris contra, but a later case accordingly.*

54. *Court of Chancery would appoint a larger number of trustees if proper.*

55. *Court in appointing new trustees cannot give them a power to appoint their successors.*

56. *Power in a party not disregarded by Court.*

VI. *As to course of procedure.*

57. *Who may apply under the act.*

58. *Powers of the Masters and of the Court.*

59. *Order may be postponed till right declared in suit.*

60. *Powers to Lord Chancellor and Court of Chancery of Ireland.*

1. THE act of the 13 & 14 Vict. c. 60, repeals the acts of 1 Will. 4, c. 60, the 4 & 5 Will. 4, c. 23, and

the 1 & 2 Vict. c. 69 (a); but it does not repeal the 1 Will. 4, c. 47, the 2 & 3 Vict. c. 60, or the 11 & 12 Vict. c. 87, although some of their provisions are of the like nature as those in the new law, nor indeed are the last-mentioned three statutes referred to by the new statute (I). The relief afforded by the act extends,

1. To lunatic and infant trustees and mortgagees;
2. To trustees generally, out of the jurisdiction—or, the like;
3. To trustees under devises for payment of debts or parties to suits;
4. To mortgagees in certain cases;
5. To the appointment of new trustees;

and lastly, to escheats in the cases of trustees or mortgagees. And of each of these in its order, although not precisely in that adopted in the statute.

I. Of lunatic and infant trustees or mortgagees.

2. Where any lunatic or person of unsound mind (II) shall be seised or possessed of any lands upon any trust (III), or by way of mortgage, the Lord Chancellor

(a) Sec. 1. As it will be necessary to constantly refer to this act, a copy of it is inserted in the Appendix.

(I) Since writing this chapter, I have seen Mr. Headlam's publication of the act, with notes, which I shall notice where necessary. The learned framer of the act states, that the above-mentioned acts were not repealed, because, although the new act gives a simpler process for several of the objects provided for by those statutes, yet there seemed no substantial objection to an option being left of proceeding either under the new act or under those statutes: Headl. Trustee Act, 1850, p. 2, n.

(II) The words, "person of unsound mind," were not contained in the 3d section of 1 Will. 4, c. 60; but the case of a person not found lunatic by inquisition was provided for to a *certain extent* by the 5th section. As by this act (s. 52) a general power is given to the Lord Chancellor to postpone making an order until a commission has issued, this restraint upon his discretion was omitted, Headl. 12, 13.

(III) The word "trust" shall not mean the duties incident to an estate conveyed by way of mortgage, s. 2: the doubts which had arisen on the old act had been removed by the 1 & 2 Vict. c. 29, but to avoid these doubts this clause was introduced: Headl. p. 8, n.

may make an order that such lands be vested in such person or persons in such manner and for such an estate as he shall direct (*b*). In cases of difficulty it will be necessary to look at section 2 for the interpretation of the words, “lunatic;”—“person of unsound mind;”—“seised;”—“possessed;”—“lands;”—“trust;”—“mortgage;”—“Lord Chancellor;” (*I*). And a like power is given to release a contingent right, or to dispose of the same, as the Chancellor shall direct; and section 2 explains the words “contingent right” (*c*). And full powers are given to the Lord Chancellor over any stock or chose in action (*d*), vested solely or jointly with others in a lunatic or person of unsound mind upon any trust or by way of mortgage (*e*). And these powers extend to the case of stock standing in the name of any deceased person whose personal representative is a lunatic or person of unsound mind, or the case of any chose in action vested in any lunatic or person of unsound mind as the personal representative of a deceased person (*f*); and the money to which any person of unsound mind is entitled payable in discharge of any land, stock, or chose in action, is to be paid into Court in the manner directed by the act (*g*). And the interpretation clause explains the meaning of the word “stock” in this clause. But the Lord Chancellor, in

(*b*) Sec. 3.

(*c*) Sec. 4. This section is entirely new. The definition, it is said, of “contingent right,” was adopted from 8 & 9 Vict. c. 106, s. 6, the object being to include in the act all the modifications of es-

(*e*) Sec. 5.

(*f*) Sec. 6.

(*g*) Sec. 48.

tates and rights which are made disposable by 8 & 9 Vict. c. 106: Headl. 13, 14.

(*d*) Stock now embraces such as are transferable by deed: the words chose in action were not in the former act: Headl. 5, 6.

(*I*) This observation applies to every other section where words are introduced which are explained in section 2.

the case of a person of unsound mind, may direct that a commission of lunacy shall issue concerning such person, and postpone making any order upon the petition before him until a return shall have been made to such commission (*h*).

3. In regard to infants—where any infant is seised or possessed of any lands upon any trust or by way of mortgage, the Court of Chancery is empowered to make an order vesting such lands in such person or persons, in such manner and for such estate as the Court shall direct (*i*). And this power is extended to contingent rights (*k*).

4. And the money to which any infant is entitled, payable in discharge of any lands, stock, or chose in action, is to be paid into Court in the manner directed by the act (*l*).

II. Of trustees out of the jurisdiction, or the like.

5. The act gives power to the Court to make orders for vesting lands as it shall direct where a trustee is *out of the jurisdiction, or cannot be found* (*m*) (I). And the power extends to cases where there is a joint seisin or possession (*n*) (II). And it further extends to contingent rights in both cases (*o*).

6. And where there shall have been two or more persons jointly seised or possessed of any lands upon

(*h*) Sec. 52. (*i*) Sec. 7. (*k*) Sec. 8. (*l*) Sec. 48.

(*m*) Sec. 9. (*n*) Sec. 10. (*o*) Sections 11, 12.

(I) It is observed that the words “or cannot be found,” are new, and will be found of considerable practical convenience. *Cave will however*, it is added, *be required on the part of the Judge or Master who has to make the necessary inquiries, to ascertain that sufficient exertions have been made to find where the absent trustee is:* Headl. 17.

(II) In this section the words, “upon any trust,” are omitted, but they clearly would be supplied from the context.

any trust, and it shall *be uncertain which of such trustees was the survivor*, the Court has like power to make an order vesting such lands as it shall direct (*p*).

7. And where any one or more person or persons shall have been seised or possessed of any lands upon any trust, and it shall *not be known as to the trustee last known to have been seised or possessed whether he be living or dead*, the Court has like power to make an order vesting such lands as it shall direct (*q*).

8. And when any person seised of any land upon any trust shall have *died intestate* as to such lands, *without an heir* or shall have died and it *shall not be known who was his heir or devisee*, the Court has like power to vest such lands as it shall direct (*r*).

9. And when any lands are subject to a contingent right *in an unborn person or class of unborn persons* who upon coming into existence would become seised or possessed of such lands upon any trust, the Court has full power to release or vest such contingent right or the estate as it shall think fit (*s*) (I).

(*p*) Sec. 13. This section contains the word "possessed," and therefore applies to leaseholds, which s. 8 of 1 Will. 4, c. 60, did not: it was purposely omitted in the latter act, in order not to interfere with the jurisdiction of the Ecclesiastical Court: Headl. 19.

(*q*) Sec. 14.

(*r*) Sec. 15.

(*s*) Sec. 16. This is new; but it is justified by reference to the 17th section of 1 Will. 4, c. 60, and the 1 Will. 4, c. 47: Headl. 22.

(I) As the 1 Will. 4, c. 47, has not been repealed, it will still be lawful for the Court to make orders under it. The 29th section of this act however, it is observed, expressly provides for cases where sales of estates are directed by the Court for the purpose of paying the debts of deceased persons, so that the power given by the 16th section alone will be available, in addition to the power conferred by the 1 Will. 4, c. 47: Headl. 23.

10. The power of the Court is equally extended to cases where a trustee solely or jointly seised or possessed shall, after demand by a person entitled or his agent, have stated in writing that he will not convey, &c. the same, or shall neglect or refuse to convey, &c., for twenty-eight days next after a proper deed shall have been tendered to him by any person entitled or his agent (*t*). And contingent rights in like cases are subjected to the same power (*u*).

11. And where a decree shall have been made by any court of equity directing the sale of any lands for the payment of the debts of a deceased person, *every person* seised or possessed of such lands or entitled to a contingent right therein *as heir, or under the will* of such deceased debtor, shall hold it upon a trust within the meaning of the act, and the Court may wholly discharge the contingent right under the will, of any unborn person (*x*).

12. We may observe that the 1 Will. 4, c. 47, which is not repealed by the 13 & 14 Vict., gave power to the Court in suits for payment of debts of a deceased person to compel infant heirs or devisees to execute a conveyance to which legal validity was given (*y*). A conveyance under this section was held to pass only such interest as the infant of full age could have transferred (*z*). It was held to extend to the case of the heir of a devisee (*a*), and it was held that infant tenants in tail by devise might be ordered to convey under this

(*t*) Sec. 17.

(*u*) Sec. 18.

(*x*) Sec. 29.

(*z*) Heming *v.* Archer, 8 Beav. 294.

(*y*) Sec. 11 applies to a prior decree. Chapman *v.* Tennant, 2 Russ. & Myl. 74.

(*a*) Brook *v.* Smith, 2 Russ. & Myl. 73.

section (b) (I). And where the devise was to trustees in fee to pay the testator's debts, and at a given time to convey the estate, subject to his debts, to his son and his issue in strict settlement, and the trustees conveyed accordingly, under which conveyance a grandson was tenant in tail in remainder, it was held that he could convey under the act, for it was in effect a devise of estates by circuitry (c). Where the estate was devised in settlement, the Court was empowered by the statute of William to direct the tenant for life or other person having a limited interest, or the first executory devisee thereof, to convey, and legal validity was given to such conveyance (d). And it was held that a tenant for life alone might convey the fee under this provision, although, under the 11th section, a conveyance might be compelled from the persons entitled after the estate for life (e). And this act was held to extend to copyholds, although they were not liable to debts when the act passed (f). These provisions were by a subsequent act (g) extended to authorise courts of equity to direct mortgages as well as sales to be made of the estates of such infant heirs or devisees, and also of estates so devised in settlements as aforesaid, and

(b) *Penny v. Pretor*, 9 Sim. 135.

(c) *Walker v. Aston*, 9 Sim. 87.

(d) *Cheese v. Cheese*, 15 L. J.,
N. S., 28.

(e) *Branch v. Browne*, 2 De Gex
& Sma. 299.

(f) Sec. 12.

(g) 2 & 3 Vict. c. 60, s. 1.

(I) This section 11 was held not to take away the right of an infant to a day to show cause against a decree of foreclosure, *Price v. Carver*, 3 Myl. & Cra. 157; see *Jones v. Ham*, 3 Ir. Eq. Rep. 65. Where the estate of an infant was sold under a decree, the direction for the sale was held to have the effect of constituting him a trustee within the meaning of 1 Will. 4, c. 60, s. 6, 18; *in re Blackwell*, 7 Jur. 9. See *post*, s. 30, and note.

to authorise such sales and mortgages to be made in cases where such tenant for life, or other person having a limited interest or such first executory devise, is an infant. This important provision appears to be still in full operation.

13. And by the last-mentioned act it is provided that the surplus monies arising from any sale or mortgage under that or the preceding act shall descend or devolve in the same manner as the estate itself would have done (*h*).

14. By a later act (*i*), in cases in other respects falling within the provision of the 1 Will. 4, c. 47, before referred to, where the devise is in settlement, that provision is extended to any case in which any estate of any deceased person is by descent, or otherwise than by devise, vested in the heir or co-heirs of such person, subject to an executory devise over, in favour of a person or persons not existing or not ascertained. This enactment removed the difficulty raised in the case of *Heming v. Archer* (*k*).

15. But to return to the new act of Victoria: After a decree, whether for specific performance of a contract for lands, or for partition or exchange, or generally, when any decree shall be made for the conveyance or assignment of any lands in cases of election, or otherwise, the Court may declare any of the parties to the suit trustees within the act; and this is extended to unborn persons who might claim under any party to the suit, or under the will or voluntary settlement of any person deceased who was a party to the con-

(*h*) 2 & 3 Vict. c. 60, s. 2.

(*i*) 11 & 12 Vict. c. 37.

(*k*) 7 Beav. 515; 8 Beav. 294;
9 Beav. 366.

tract or transactions concerning which such decree is made (*l*) (I).

16. In regard to stock and choses in action, the act contains full provisions for giving effect to any trust where any person is jointly entitled upon any trust with any person *out of the jurisdiction*, or *who cannot be found*, or *it is uncertain whether he be living or dead* (*m*), or where any sole trustee *neglects or refuses to transfer or to receive the dividends, or sue for them for twenty-eight days* (*n*), or where one of the trustees is guilty of a like neglect or refusal (*o*). And these provisions are further extended to the cases where any stock is standing in the name of a deceased person, and his personal representative is out of the jurisdiction, or cannot be found, or it shall be uncertain whether he be living or dead, or he shall make such neglect or refusal for twenty-eight days as before mentioned (*p*).

17. And full legal effect is given to any order vesting the right to any stock in any person appointed by the Lord Chancellor or the Court of Chancery (*q*), and a

(*l*) Sec. 30 ; see upon the 1 Will. 4, c. 60, after a decree against devisees of a mortgagor who were married women, *Hood v. Hall*, 14 Jur. 127 ; and see *King v. Leach*, 2 Hare, 57 ; *in re Milfield*, 2 Phill. 254 ; *Thomas v. Gwynne*, 9 Beav.

275 ; *Billing v. Webb*, 1 De Gex & Sma. 716.

(*m*) Sec. 22.

(*n*) Sec. 23.

(*o*) Sec. 24.

(*p*) Sec. 25.

(*q*) Sec. 26.

(I) This section materially increases the jurisdiction of the Court of Chancery ; it includes partition, exchange, and cases of election : indeed the jurisdiction is now unconfined, and it is thought that this power may be safely left to the discretion of the Court of Chancery. And as the Court now can vest the estates in the proper persons, it is presumed that an infant will no longer have a day to show cause : *Headl.* 42.

legal right to sue for a chose in action is given (*r*) ; and the Lord Chancellor and the Court have power to direct how the right to any stock or chose in action vested under the provisions of the act shall be exercised (*s*) (*I*).

18. Where in a suit it appears by affidavit that a mere trustee cannot be found to serve him with process, the Court is empowered to make a binding decree in his absence ; but this will not affect any beneficial interest in him (*t*).

III. As to mortgages.

19. The act gives no further relief in the case of a mortgage, unless where any mortgagee shall have died without having entered into the possession or into the receipt of the rents of the lands, and the money due in respect of such mortgage shall have been paid to a person entitled to receive it, or such person shall consent to an order for the reconveyance, then the Court may make a vesting order in any of the following cases ; viz.

When an heir or devisee of such mortgagee shall be out of the jurisdiction, or cannot be found :

When an heir or devisee of such mortgagee shall, upon a demand, have stated in writing that he will not convey, or shall not convey, for twenty-eight days after a proper deed tendered to him :

When it shall be uncertain which of several devisees of such mortgagee was the survivor :

(*r*) Sec. 27.

(*s*) Sec. 31.

(*t*) Sec. 49.

(*I*) Under the 1 Will. 4, c. 60, the Court only appointed a new trustee, and had no power to administer the trusts, *in re* Ward, 2 Mac. & Gor. 73.

When it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee, whether he be living or dead :

When such mortgagee shall have died intestate as to such lands, and without an heir, or shall have died and it shall not be known who is his heir or devisee (*u*).

And the Lord Chancellor or the Court of Chancery may, if it be deemed more convenient, appoint a person to convey or assign instead of making a vesting order, and may make an order directing an immediate transfer of stock (*x*) (I).

20. As to copyholds, effect is given at once to the vesting order, if made with the consent of the lord of the manor, and, if not, the person appointed is enabled to complete the assurance (*y*).

21. And whenever an order shall be made to convey or assign lands, or release or to dispose of any contingent right, and such order shall be founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or devisee of a mortgagee is out of the jurisdiction, or cannot be found, or that it is uncertain which of several trustees or which of several devisees of a mortgagee was the survivor, or whether the last trustee or the heir or last surviving devisee of a mortgagee be living or dead, or an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is

(*u*) Sec. 19 ; see Headl. n. to p. 25. It may be observed, that although the 6 Geo. 4, c. 74, gave the same remedies with respect to estates held by way of mortgage

as with respect to estates held upon trust, yet it omitted to provide how the money was to be paid.

(*x*) Sections 20, 26.

(*y*) Sec. 28.

(I) Provision is made for the jurisdiction of the Court of the Duchy of Lancaster, and of the Courts of Lancaster and Durham, s. 21.

not known who is his heir or devisee, then the order itself is to be *conclusive evidence* of the matter so alleged in any court of law or equity upon any question as to the legal validity of the order. But the Court itself may grant relief where the order has been improperly obtained (z) (I).

22. In the 8th section of the 1 Will. 4, c. 60, the words "by way of mortgage" were purposely omitted, and it was accordingly repeatedly decided that the section which provided for the cases of a trustee being out of the jurisdiction, &c., did not embrace mortgagees or their heirs (a).

23. The 4 & 5 Will. 4, c. 23, provided that there should be no escheat or forfeiture of the estate of a trustee or mortgagee beyond his beneficial interest, and it authorised the Court to appoint a person to convey in like manner as by the 1 Will. 4, c. 60, was provided in case the trustee *or mortgagee* had left an heir, and it was not known who was such heir. Now this was altogether a mistake, for the 1 Will. 4, c. 60, provided no remedy for the case of a mortgagee leaving an heir

(z) Sec. 44.

Llo. & Goo. temp. Sugd. 11 ; *in re*

(a) *In re* Goddard, 1 Myl. & Stanley, 5 Sim. 320 ; *ex parte* Kee. 25 ; *Prendergast v. Eyre*, Payne, 6 Sim. 645.

(I) This provision, it is said, will materially add to the value of the proceedings under the act ; and with respect to all the facts enumerated in this section, it is anticipated that no conveyancer will be entitled to demand any proof of them to establish that the Court was justified in making an order under the act, but it does not establish the fact of a person being a trustee, Headl. 53. Considering the manner in which these orders are obtained *ex parte*, this section appears to me to have removed, in a great measure, the only real check upon them—that if the allegations were unfounded, the order could not be maintained ; and that upon a sale, the purchaser would require the evidence upon which the order was made. How the Courts will deal with such a case as against a purchaser remains to be seen.

who was not known. It was, however, decided that mortgagees and the heirs of mortgagees were within the 8th section of the 1 Will. 4, c. 60, *as explained by the subsequent act (b)*.

24. The 1 & 2 Vict. c. 69, provided relief in certain cases of mortgages, but the 3d section enacted that the acts of 1 Will. 4, c. 60, and 4 & 5 Will. 4, c. 23, or either of them, should not be construed to extend to any case of any person dying seised of any land by way of mortgage, "other than such as were thereinbefore expressly provided for." Shadwell, V. C., after having consulted Lord Langdale, held that the cases where it was uncertain whether a mortgagee had left an heir, and where the heir of a mortgagee was an infant, were neither of them expressly provided for by the 1 & 2 Vict. c. 69, but he held that the 3d section in this act was introduced in order to confine *its application* to those cases which are expressly mentioned in it, and he held that both cases fell within the 1 Will. 4, c. 60 (c). The learned Judge was in error as to the 3d section of the 1 & 2 Vict., for that does not confine the application of *that* statute to the cases expressly mentioned in it, but prevents the two other acts (1 Will. 4, and 4 & 5 Will. 4) from extending to any case of any person dying seised of any land by way of mortgage other than such as were before expressly provided for by the 1 & 2 Vict. The Vice-Chancellor, however, came to the same conclusion *in re Williams (d)*, although he was at first of a different opinion (e), and he made a like decision in a later case (f); but when deciding the

(b) *Ex parte Whitton*, 1 Kee. 278; *in re Stanley*, 7 Sim. 170.

(c) *In re Wilson*; *in re Gathorne*, 8 Sim. 392.

(d) 9 Sim. 642.

(e) 9 Sim. 426.

(f) *In re Thomson*, 12 Sim. 392.

two last-mentioned cases he was not aware of a case decided by Lord Langdale, after the decision *in re Wilson* and *in re Gathorne*, and before the decisions in the other cases in which the Master of the Rolls decided that the case of a mortgagee out of the jurisdiction was not within the 1 & 2 Vict. c. 69, and he did not follow up his decision in *ex parte Whitton*, but considered that the act of Victoria had precluded the extension of the effect of the 8th section of 1 Will. 4, c. 60, by construction, to any other case of mortgage, and from his judgment it appears that the Vice-Chancellor had misapprehended him when he spoke to him on the subject (*g*). It seems clear that this case laid down the true rule of construction (*h*). Although these acts have been all repealed, yet this review of the decisions seems to be necessary in order to enable us to ascertain where a title has been gained under orders made before the acts were repealed, and also to enable us to rightly comprehend the operation of the new law. It was of course held that the 1 & 2 Vict. c. 69, was confined to the cases enumerated in it where the mortgagee died seised of the land without having been in possession, &c. It was held not to extend to a mortgagee out of the jurisdiction, nor to the case where it was uncertain whether the mortgagee had left an heir, nor to the case where the mortgagee had left an infant heir; and it was therefore suggested in a note to the last edition of the writer's work on Purchases, that it appeared to be still necessary to include within the 1 & 2 Vict. c. 69, the case of an infant heir, and the cases where it is uncertain whether there is an heir.

(*g*) *Green v. Holden*, 1 Beav. 207.

(*h*) See *Spunner v. Walsh*, 10 Ir. Eq. Rep. 214.

25. The new act (*i*) does not include an infant heir in section 19, as no doubt the provisions in sections 7 and 48 were considered to be sufficient to enable the Court to act upon his interests in all cases; and it would seem to be so, for the power over infants is not now controlled by any such proviso as was contained in the 2 & 3 Vict. c. 69 (I).

26. The case of a mortgagee out of the jurisdiction is not within the new act, and it is, I apprehend, properly omitted; and the case where it is uncertain whether there is an heir of the mortgagee is not provided for in those terms, but it was no doubt intended to be provided for under the words, "when an heir or devisee of such mortgagee shall be out of the jurisdiction *or cannot be found*;" and there are in section 19 besides, these words: "when such mortgagee shall have died intestate as to such lands, and without an heir, *or shall have died, and it shall not be known who is his heir or devisee*" (*k*). These observations apply equally to trust estates.

IV. As to escheats of trust estates or mortgages.

27. No lands, stock, or chose in action vested in any person upon any trust, or by way of mortgage, shall escheat or be forfeited by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his or her co-trustee, or descend or vest in his

(*i*) 13 & 14 Vict. c. 60.

(*k*) See acc. Headl. 28, n.

(I) It appears that such was the view of the framer of the act, as provision is made (as it was in the 1 Will. 4, c. 60) for the payment of any sum of money due to an infant upon a mortgage; and in the case of lunatics, the committee of the lunatic's estate is a party to the proceedings (see s. 3, 7, and 48); Headl. 26, n.

or her representative (*l*) ; but this is not to extend to any beneficial interest (*m*).

28. The 1 & 2 Vict. c. 69, enlarged the powers of the 1 Will. 4, c. 60, and the 4 & 5 Will. 4, c. 23, as to mortgages, but properly confined the relief there given to cases where the mortgagee had died without having been in possession, and the money due should have been or should be paid to his executor or administrator ; for it was not thought safe in other cases of an absent heir of a mortgagee or the like to give a more extensive power to the Court. The previous act of 4 & 5 Will. 4, c. 23, provided that there should be no escheat or forfeiture in the case of a trust or mortgage for want of an heir of a trustee or mortgagee, or by reason of the attainder or conviction for any offence of such trustee or mortgagee ; but this was not to prevent the escheat or forfeiture of any beneficial interest in such trustee or mortgagee. The proviso in section 3 of the 1 & 2 Vict. c. 69, enacted, as we have seen, that the two acts of 1 Will. 4, c. 60, and 4 & 5 Will. 4, c. 23, or either of them, should not be construed to extend to any case of any person dying seised of any land by way of mortgage, other than such as were therein-before expressly provided for. This has already been explained.

29. Now the act of 13 & 14 Vict. c. 60, repeals all the three acts, and in substance re-enacts, in section 19, the provisions of the 1 & 2 Vict. c. 69, but with the additions already noticed. And the new statute provides that no lands, &c. vested in any person upon any trust, or by way of mortgage, shall escheat or be forfeited by reason of the attainder or conviction for any

(*l*) Sec. 46.

(*m*) Sec. 47.

offence of such trustee or mortgagee ; but this, as before, was not to prevent the escheat or forfeiture of any beneficial interest (*n*).

30. It was observed in a note to the last edition of the writer's work on Purchases, that the cases of escheat would require to be re-considered with reference to the 4 & 5 Will. 4, c. 23, and the provisions in the 2 & 3 Vict. c. 69, s. 1, coupled with the proviso.

31. The new act does not repeat the escheat and forfeiture clauses in the 4 & 5 Will. 4, c. 23, but limits the new remedy to the cases of escheat and forfeiture by reason of the attainder or conviction of any such trustee or mortgagee. The part of the former act extending the relief to the cases where the escheat was in consequence of the trustee or mortgagee dying without an heir was probably omitted in the recent act, because the former sections were supposed, in both the case of a trustee and the case of a mortgagee, to provide a remedy where he died without an heir. This certainly is so as to a trustee, but it does not appear to be so universally as to a mortgagee. The 19th section of the new act was, following the provision in the 1 & 2 Vict. c. 69, confined to cases where the mortgagee had not been in possession, &c.; and in *such cases* it does provide for the case of a mortgagee dying without an heir, and that, so far, is quite correct. But it does not provide generally, like the 4 & 5 Will. 4, c. 23 (I), for the case of escheats for the want of an heir of a mortgagee, and it would therefore seem that some difficulty may arise as to an escheat of a mortgage for want

(*n*) Sec. 46.

(I) In a note to s. 46, it is said that "this clause, and the following one, merely re-enact the 3d and 5th sections of 4 & 5 Will. 4, c. 23." Headl. 56.

of an heir of a mortgagee, where the case does not fall within the 19th section. The writer is not sure that the proviso in the 2 & 3 Vict. c. 69, for which he is responsible, did not mislead the framer of the 13 & 14 Vict. c. 60.

32. It should be kept in view that the old provisions as to escheat or forfeiture are repealed, and that the new ones are prospective only, and that the provision in 4 & 5 Will. 4, c. 23, which provided for past escheats and forfeitures of trust estates, was repealed, but not re-enacted by the later act. So much confusion had arisen in regard to the former acts, that it would not be a matter of surprise if difficulties were still found to exist upon this important subject.

33. The 7 & 8 Vict. c. 79, s. 9, enabled an executor or administrator of a mortgagee entitled to the mortgage money upon redemption, to reconvey the legal estate where possession had not been taken by virtue of the mortgage and no action or suit was depending; but this provision has been properly repealed as from the 1st October 1845 (*o*).

V. As to the appointment of new trustees.

34. To return to the provisions of the new act: Whenever it is expedient to appoint a new trustee or new trustees, and it shall be found *inconvenient, difficult, or impracticable so to do without the assistance of the Court of Chancery*, the Court may make an order appointing a new trustee or new trustees, either in substitution or in addition to any existing (1) trustee or trustees (*p*), and they are to have the same powers as

(*o*) 3 & 9 Vict. c. 106, s. 1.

(*p*) Sec. 32.

(1) This has been held, I am told, to include a disclaiming trustee; and also, it seems, a deceased trustee.

if appointed by decree in a suit (*q*) ; and the Court can by orders vest the estate accordingly (*r*), and in like manner give effect to an appointment over stock (*s*). But no former or continuing trustee is to be discharged, further than an appointment of new trustees under any power would have discharged him (*t*).

35. The Lord Chancellor and the Court of Chancery are severally authorised to exercise the powers by the act conferred for the purpose of vesting any property in the trustees of any charity (I) or society over which charity or society the Court would have jurisdiction, upon suit duly instituted, whether such trustees shall have been duly appointed by any power contained in any deed or instrument, or by the decree of the Court, or by order made upon a petition to the Court under any statute authorising the Court to make an order to that effect in a summary way (*u*).

36. By the general orders of the Court of Chancery made in April 1850, which was about four months before the act of the 13 & 14 Vict. passed, and which orders were made under powers conferred by the legislature, *a claim* may be made where a person is entitled to have a new trustee appointed in a case where there is no power in the instrument creating the trusts to appoint new trustees, or where the power cannot be exercised and he seeks to appoint a new trustee. In Ireland, the act of the 13 & 14 Vict. c. 89, provides that parties may proceed by petition instead of bill, and that any such petition with respect to the appoint-

(*q*) Sec. 33. (*r*) Sec. 34. (*s*) Sec. 35. (*t*) Sec. 36.
 (*u*) Sec. 45. The provision repealed was s. 23 of the 1 Will. 4, c. 60.

(I) A power of appointing new trustees for a charity receives a liberal construction ; see 2 Sugd. Pow. 508.

ment of new trustees under any deed, will, or other instrument, may by order in a summary way, and without notice, unless the Court see fit to direct any notice to be given, be referred to the Master, either with or without any special directions. And the Master is to proceed as directed by the act (*x*).

37. There is no application to the Court of Chancery which requires more strictly watching than one to appoint new trustees. It constantly happens that the parties beneficially interested desire trustees to commit a breach of trust, *e. g.* to lend the money to the husband, with the wife's consent, and almost always upon personal or insufficient security. It is not possible to convince such persons that the trustees are not depriving them of their just control over their own property upon merely technical grounds. Invariably upon the refusal of the trustees, the next application to them is to transfer the property to new trustees. Where they are well advised, trustees refuse to do so; because they know that the object is to carry into effect the arrangement which they considered would be a breach of trust. The writer, in order to guard against these practices being carried into execution under the sanction of the Court, proceeded with caution in framing the 1 Will. 4, c. 60, and confined the summary jurisdiction to cases of disabilities where the recent creation or declaration of the trust or other circumstances might render it safe and expedient to direct, by an order upon petition, a transfer to a new trustee, without compelling the parties to file a bill, although there was no power in any deed or instrument to appoint new trustees (*y*). And this provision

(*x*) Sections 15—20.

(*y*) 1 Will. 4, c. 60, s. 22.

was carried into execution by the Courts with great caution (z) (I).

38. There can hardly be any case, whether there be a power to appoint new trustees or not, and although all parties are competent to appoint new trustees without the assistance of the Court, which may not be brought within the new act, for it can seldom be difficult to prove that it is inexpedient, difficult, or impracticable to appoint new trustees without the assistance of the Court. And as the parties may go in the first instance before the Master, and a conveyance can in effect be made by the order itself, without the concurrence of the old or continuing trustees, this power will surely be abused, although the Court act with caution, and watch the proceedings

(z) See Jemmett on the Statute, 2d edit. 174.

(I) The learned framer of the new act observes that the clause has been purposely drawn perfectly general, so that there will be no restraint upon the Court except its own discretion in the appointment of new trustees upon summary applications. And adverting to the vesting clauses, and that the expense of the appointment of a new trustee under the act ought to be very trifling, he anticipates that in a very great number of cases the application will be under the act; and if the clauses are found practically to work well, that there will no longer be a necessity for the insertion in deeds of powers for the appointment of new trustees, Headl. p. 46, n.; and see *ib.* 55, n. This shows the extent to which it is proposed to carry this general provision. But it is not the proper province of courts of equity to act where the parties can perform the act required without their aid. And it does not seem desirable to increase the jurisdiction of the courts of equity, and add unnecessarily to their labours, whilst complaints are made of the delays in those courts: nor is there any reason to suppose that the expense in these cases will be trifling: neither does it seem politic to enable parties, without cause, to evade the stamp duties, whilst others, in like cases not before the courts, pay them, although the fiscal laws ought not to be allowed to stand in the way of a real improvement. It would be improper to omit in wills or settlements the usual power of appointing new trustees.

vigilantly. If the references, or the orders confirming the Master's certificate, should pass as matters of course—as similar orders have too often been permitted to do—families will no doubt in many instances be deprived by fraud and management of the provision intended for them. It is manifestly the duty of the Judge who makes the order to satisfy himself, not by the assertion of counsel nor by the Master's report, but by his own perusal of the papers, that the case is a proper one in which to make the order sought.

39. As trustees may of course still be appointed under powers, and the Court ought never to interfere under the statute when there is such a power, without a manifest necessity, it may now be useful to state the construction put in various cases on powers to appoint new trustees, and the extent of the power of the Court, independently of the statute. The usual frame of such a power, and the manner in which it should be executed, is considered elsewhere (*a*).

40. A power in a settlement of real estates was given in case of the death of any or either of the trustees for the husband and wife, or the survivor, with the consent of the surviving co-trustee or co-trustees, to appoint any new trustee or trustees, and that upon such appointment the surviving co-trustee should convey the estate, so that the surviving trustee or trustees might be jointly concerned in the trusts in the same manner as such surviving trustee and the person so dying would have been in case he were living, it was held, that the power authorised the appointment of

(*a*) 2 Sugd. Pow. 500.

new trustees after the death of both the original trustees (*b*).

41. And where the power to the husband and wife in a settlement of personalty was, together with the surviving, or continuing or acting trustee for the time being, to appoint a new trustee to supply the place of the trustee dying, &c., it was considered that the power could be exercised on the removal of the surviving trustee as incapable or unfit to act in the trusts. The fair meaning of such a power, it was said, plainly was to appoint new trustees whenever the event requiring such change should arise (*c*).

42. A *continuing* trustee has been held to be within a power, in case either of two trustees should decline to act, to the *survivor* of the trustees to appoint new trustees. But such a power could not be exercised if both of the trustees refused to accept the trust (*d*).

43. These authorities were followed in a case (*e*) where the power in a will was in case either of the trustees, *A. B.* and *C.*, or any succeeding trustee or trustees, should die or refuse &c. the trusts, for the survivor of *A. B.* and *C.* and such trustee or trustees to be nominated in their stead to appoint new trustees. One of the trustees *A. B.* and *C.* died, another disclaimed, and the third appointed two new trustees, which was held to be a valid appointment. The Court thought this conclusion might be supported even upon the context of the clause, but that it might be supported on a broader ground. If the three trustees had

(*b*) *Morris v. Preston*, 7 Ves. 547;

2 Sugd. Pow. 503. The point upon

the power in *White v. Parker*,

1 Bing. N. C. 573, was not decided.

(*c*) *In re Roche*, 2 Dru. & War.

287.

(*d*) *Sharp v. Sharp*, 2 Barn. &

Ald. 405.

(*e*) *Cafe v. Bent*, 5 Hare, 24; 3 Hare, 245.

not been mentioned by name in the introductory part of the clause, it would have been clear to demonstration that the power was annexed to the office of the trustee, in which case the disclaimer of one would have vested the office of trustee in the remaining two, and the power would, in fact, have been exercised by the surviving trustee, and the cases justified the Court in holding that the trustees were so named in the introductory part of the clause, not for the purpose of founding a distinction between them and future trustees, but only because they happened in fact to be the trustees for the time being.

44. Where the power is given to executors, it may be exercised by those who act. This was decided in a case where the power in a settlement was reserved to a person, his executors, administrators, or assigns. One of his executors renounced, and the other two proved the will, and the latter appointed a new trustee. The Court said that the question in all such cases is, whether the confidence is reposed in the individuals named, or in the persons who *de facto* fill the given office. The intention of the parties was that those whom the testator trusted to administer his property should also be trusted to exercise the power given to him in the settlement. Those whom he trusted were the persons who acted, and not those only whom he named (*f*).

45. It has been decided that under the common power in a will to the testator's wife to appoint new trustees "as often as any of his first or future trustees shall die or desire to be discharged from, or refuse, or become incapable to act in the trusts," a vacancy occasioned by the death of a trustee in the testator's

(*f*) *Earl Granville v. McNeile*, 7 Hare, 150.

lifetime cannot be filled up after his death under the power (*g*). The late Vice-Chancellor had already expressed the same opinion in an earlier case (*h*); but in that case there were legacies to the acting trustees, which created a difficulty in regard to the construction of the power to appoint new trustees. But in a simple case, surely the decision is an unsound one: it depends upon a narrow construction of the language, and disregards the general object and scope of the power, and also disregards the leaning of the authorities in analogous cases. No doubt the place of a trustee dying in the testator's lifetime cannot at that time be filled up by an appointment under the power; but when the will operates by the death of the testator, what is there then to prevent the power from being exercised? The case provided for exists, and requires the exercise of the power. The testator intended that the remaining trustees should fill up the places of those who died. Can it be material that the vacancy was created a month before his death instead of some time after it? If this decision be adhered to, it will render it necessary to add some words to the old power; and it is in this way that our forms of conveyancing have become so verbose.

46. Where there were three classes of trusts in a will, and three sets of trustees—first, R. Sharp and Rice; second, Mary Sharp, R. Sharp, and Davis; and third, R. Sharp and Davis—and the power of appointing new trustees was in case either R. Sharp and Rice, so far as applied to the trusts reposed in them respectively, or Mary Sharp, R. Sharp, and Davis, so far as applied to the trusts reposed in them respectively,

(*g*) *Winter v. Rudge*, 15 Sim. 596.

(*h*) *Walsh v. Gladstone*, 14 Sim. 2.

should die or desire to be discharged from the trusts, &c., it was decided that the power did not extend to the third class, namely R. Sharp and Davis, although no doubt the framer thought it unnecessary to repeat their names (*i*).

47. Bankruptcy of a trustee has been held to constitute an unfitness within such a power (*k*), but a residence in China has not been deemed to constitute an incapacity of acting within the power (*l*).

48. Where marriage articles provide for the investment of a fund in the names of trustees, to be for that purpose appointed, it must depend upon the fair construction of the whole of the instrument by whom the appointment is to be made, if the deed itself is silent on that head (*m*).

49. Where the intention is clear that the assigns of the trustee are to carry on the trusts, the trustee may devise the estate to others as trustees, although there is no express power for that purpose (*n*).

50. If two trustees were to retire from the trust, and appoint only one trustee in their place, although the settlement manifested an intention that there should always be two trustees, the appointment would be invalid, and they would be responsible for the new trustee (*o*).

51. Whether under a power more than one trustee can be appointed in the place of an old one has been

(*i*) *Sharp v. Sharp*, 2 Barn. & Ald. 405; 2 Sugd. Pow. 504.

(*k*) *In re Roche*, 2 Dru. & War. 287.

(*l*) *Withington v. Withington*, 16 Sim. 104.

(*m*) *Brasier v. Hudson*, 9 Sim. 11; see 2 Sugd. Pow. 505.

(*n*) *Titley v. Woolstenholme* 7 Beav. 425; but see *Ockleston v. Heap*, 1 De Gex & Sma. 640, *contra*.

(*o*) *Hulme v. Hulme*, 2 Myl. & Kee. 682; the power is not stated: it appears to have been a gross breach of trust.

doubted. If the power clearly require that only one person shall be substituted in the place of another, of course it must be complied with. But under a power in the common form, or general in its terms, it seems, upon both principle and authority, that more than one person may be appointed to fill a vacancy by the death, &c. of one of the old trustees.

52. In *Sandys v. Nugee* (*p*), which arose upon a Scotch settlement, but which was not distinguishable on that ground, the power seemed to intend only one person to be appointed in lieu of each of the trustees; but Shadwell, Vice-Chancellor, said that the trustee named in the settlement was authorised by the power to determine what other person should succeed to himself: he did so by naming three persons. He saw nothing in the objection. And in *D'Almaine v. Anderson* (*q*), where there were two trustees in a will, with a direction "that if the trustees thereby appointed or to be appointed as thereafter mentioned, should die, &c., it should be lawful for the surviving or continuing trustee or trustees for the time being, or the executors or administrators of the last surviving or continuing trustee, to appoint one or more person or persons to be a trustee or trustees in the room of the trustee or trustees so dying, &c.; and thereupon the trust estates should be vested in the new trustee or trustees, jointly with the surviving or continuing trustee or trustees, or solely, as occasion should require;" the surviving trustee appointed two trustees in the room of the deceased trustee; and the Vice-Chancellor expressed his opinion that such a case was immediately

(*p*) 8 Sim. 130.

(*q*) Lewin on Trusts, 1841 ; 465.

contemplated by the proviso. The proviso was in substance in the common form.

53. In *ex parte* Davis (*r*), however, where the power was general, that in case the several trustees named in the settlement should die or be desirous to be discharged from the trusts, the husband and wife, or the survivor, might from time to time substitute or appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying or claiming to be discharged; Knight Bruce, V. C., declined to act upon an appointment under the power of four trustees in the room of three. But in a later case (*s*) the same learned Judge held an appointment of three new trustees in the place of two original trustees, under the usual power in settlements, to be valid (I). The Vice-Chancellor observed that generally it was true that there ought to be an adherence to the original number of trustees, where new trustees are substituted. This was conformable to the presumed intention of the parties where nothing to the contrary appeared, though in the abstract it might be difficult to suggest much inconvenience from appointing three trustees to act in the place of two who were dead. If, however, the instrument were so worded as to authorise an appointment of three trustees to succeed two, of course such an intention appearing must have effect given to it. The instrument before him, he thought, exhibited upon the face of it, taking the whole of it together, such an intention.

(*r*) 2 Coll. C. C. 468.

(*s*) *Meinertzhagen v. Davis*, 1 Coll. C. C. 335, or (in the report) 353.

(I) The parts in italics in the report do not seem to be other than parts of the common form.

54. Where the settlement contains no power to appoint new trustees, the Court of Chancery, independently of any legislative provision, would in a regular manner appoint new trustees; and upon the authorities it seems clear that the Court would in a proper case appoint a larger number of trustees than was named in the settlement. In *Devey v. Peace* (*t*), where under a will there was a single trustee of a term, Leach, Master of the Rolls, in referring it to the Master to appoint a new trustee, observed, that only one trustee having been appointed by the will, the Master would only have to name one. But in the matter of *Welsh, Lord Cottenham, C.*, approved of four persons being appointed trustees in the place of a lunatic who was the survivor of three original trustees (*u*); and in a later case (*x*) *Knight Bruce, V. C.*, referred it to the Master to appoint three or more trustees, although only two were appointed by the will, one of whom had died and the other desired to be discharged. Where, by the true construction of the instrument, the power authorises the appointment of more than the original number of trustees, no question can of course arise (*y*).

55. Where there is no power to appoint new trustees, or no person to execute it, equity, by force of its own jurisdiction, and without reference to the powers in the act, would in a regular suit, when the trustees are dead, or are entitled to be discharged, appoint new trustees, but the Court could not delegate its authority; and therefore a power could not be inserted in the deed to

(*t*) Taml. 77.

(*u*) 3 Myl. & Cra. 292.

(*x*) *Birch v. Cropper*; 2 De Gex

& Sma. 255.

(*y*) *Meinhertzhagen v. Davis*, 1

Coll. 335 [the paging wrong in the report].

appoint new trustees, but the Court itself would make new appointments when necessary (2). Such a power has been delegated in some cases ; but it is now settled that the Court has not jurisdiction to confer it, even where the settlement gives such a power to the trustees and their successors (a). Of course parties should not now file a bill, when the relief can be properly obtained in the summary mode pointed out by the late act.

56. If a bill be filed, and a party to the cause have power to appoint new trustees, the Court, where there is no sufficient objection, would give a special direction to the Master to approve of fit persons to be nominated by the donee of the power. But if no such special direction is given, the party will have no right to require the appointment of his nominees, although the power conferred upon him by the donor is still a circumstance to be regarded by the Master (b).

VI. As to course of procedure.

57. The application under any of the provisions of the act for the appointment of a new trustee, or concerning any property subject to a trust, may be made by any person beneficially interested, whether under disability or not, or of any person duly appointed as a trustee ; and that as to property subject to a mortgage, the application under any of the provisions may be made

(2) *Bayley v. Mansell*, 4 Madd. 226 ; *Southwell v. Ward*, Taml. 314 ; *Brown v. Brown*, 3 You. & Coll. 395 ; *Bowles v. Weeks*, 14 Sim. 591 ; see *Oockleston v. Heap*, 1 De Gex & Sma. 640 ; *Howard v. Rhodes*, 1 Kee. 581 ; *Greenwood v. Wakeford*, 1 Beav. 576. In *Joyce v. Joyce*, 2 Moll. 276, the power was given, but not on argument.

Sampayo v. Gould, 12 Sim. 426, was under a decree on marriage articles.

(a) *Holder v. Darbin*, 11 Beav. 594 ; overruling *White v. White*, 5 Beav. 221 ; *Oglander v. Oglander*, 2 De Gex & Sma. 381.

(b) *Middleton v. Reay*, 7 Hare, 106 ; *in re Norwich Charities*, 2 Myl. & Cra. 275.

by any person beneficially interested in the equity of redemption, whether under disability or not, or by any person interested in the mortgage monies (*c*).

58. Persons entitled to an order under any of the provisions may go before the Master in the first instance, who may certify in favour of the order sought (*d*), which may be obtained upon motion (*e*); or they may proceed at once by petition (*f*); and the powers usually exercised by the Court are conferred upon it (*g*); and the order may be made in a cause (*h*). The Lord Chancellor or the Court has power to order costs to be paid out of the estate, or in such manner as may be thought proper (*i*).

59. The Lord Chancellor or the Court is empowered to postpone making any order upon any petition until the right of the petitioner shall have been declared in a suit duly instituted for that purpose (*k*).

60. The powers given to the Court of Chancery in England and the powers given to the Lord Chancellor in lunacy extend to the colonies. The Court of Chancery in Ireland is invested with the like powers over property in Ireland as are given to the Court of Chancery in England, and the Lord Chancellor of Ireland is invested with the like powers in lunacy over property in Ireland as are given to the Lord Chancellor of Great Britain in lunacy (*l*); and in citing the act in other acts of parliament, and in legal instruments and in legal proceedings, it will be sufficient to use the expression, "The Trustee Act, 1850" (*m*).

(*c*) Sec. 37.

(*d*) Sec. 38; and see s. 50, for the Master's power.

(*e*) Sec. 40.

(*f*) Sec. 40.

(*g*) Sections 41, 42.

(*h*) Sec. 43.

(*i*) Sec. 51.

(*k*) Sec. 53.

(*l*) Sections 54—57.

(*m*) Sec. 58.

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APPENDIX.

AN ACT to consolidate and amend the Laws relating to the Conveyance and Transfer of Real and Personal Property vested in Mortgagees and Trustees. [5th August 1850.]

WHEREAS an act was passed in the first year of the reign of his late Majesty King William the Fourth, intituled "An Act for amending the laws respecting Conveyances and Transfers of Estates and Funds vested in Trustees and Mortgagees, and for enabling Courts of Equity to give Effect to their Decrees and Orders in certain cases:" And whereas an act was passed in the fifth year of the reign of his late Majesty King William the Fourth, intituled "An Act for the Amendment of the Law relative to the Escheat and Forfeiture of Real and Personal Property holden in trust:" And whereas an act was passed in the second year of the reign of Her present Majesty, intituled "An Act to remove Doubts respecting Conveyances of Estates vested in Heirs and Devisees of Mortgagees:" And whereas it is expedient that the provisions of the said acts should be consolidated and enlarged: be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that all proceedings under the said acts or any of them commenced before the passing of this act may be proceeded with under the said recited acts, or according to the provisions of this act, as shall be thought expedient, and, subject as aforesaid, that the said recited acts shall be and the same are hereby repealed: provided always, that the several acts repealed by the said recited acts shall not be revived, and that such repeal shall only be on and after this act coming into operation.

Interpretation of Terms.

2. And whereas it is expedient to define the meaning in which certain words are hereafter used; it is declared, that the several

words hereinafter named are herein used and applied in the manner following respectively ; (that is to say,)

The word “lands” shall extend to and include manors, messuages, tenements, and hereditaments, corporeal and incorporeal, of every tenure or description, whatever may be the estate or interest therein :

The word “stock” shall mean any fund, annuity, or security transferable in books kept by any company or society established or to be established, or transferable by deed alone, or by deed accompanied by other formalities, and any share or interest therein :

The word “seised” shall be applicable to any vested estate for life or of a greater description, and shall extend to estates at law and in equity, in possession or in futurity, in any lands :

The word “possessed” shall be applicable to any vested estate less than a life estate, at law or in equity, in possession or in expectancy, in any lands :

The words “contingent right,” as applied to lands, shall mean a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent :

The words “convey” and “conveyance,” applied to any person, shall mean the execution by such person of every necessary or suitable assurance for conveying or disposing to another lands whereof such person is seised or entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance, including the acts to be performed by married women and tenants in tail in accordance with the provisions of an act passed in the fourth year of the reign of his late Majesty King William the Fourth, intituled “An Act for the Abolition of Fines and Recoveries, and the Substitution of more simple modes of Assurance,” and including also surrenders and other acts which a tenant of customary or copyhold lands can himself perform preparatory to or in aid of a complete assurance of such customary or copyhold lands :

The words "assign" and "assignment" shall mean the execution and performance by a person of every necessary or suitable deed or act for assigning, surrendering, or otherwise transferring lands of which such person is possessed, either for the whole estate of the person so possessed or for any less estate :

The word "transfer" shall mean the execution and performance of every deed and act by which a person entitled to stock can transfer such stock from himself to another :

The words "Lord Chancellor" shall mean as well the Lord Chancellor of Great Britain as any Lord Keeper or Lords Commissioners of the great seal for the time being :

The words "Lord Chancellor of Ireland" shall mean as well the Lord Chancellor of Ireland as any Keeper or Lords Commissioners of the great seal of Ireland for the time being :

The word "trust" shall not mean the duties incident to an estate conveyed by way of mortgage ; but, with this exception, the words "trust" and "trustee" shall extend to and include implied and constructive trusts, and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of personal representative of a deceased person :

The word "lunatic" shall mean any person who shall have been found to be a lunatic upon a commission of inquiry in the nature of a writ de lunatico inquirendo :

The expression "person of unsound mind" shall mean any person, not an infant, who, not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs :

The word "devisee" shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the lands of a deceased person, not as heir of such deceased person, but by a title dependent solely upon the operation of the laws concerning devise and descent :

The word "mortgage" shall be applicable to every estate, interest, or property in lands or personal estate which would in a court of equity be deemed merely a security for money :

The word "person" used and referred to in the masculine

gender shall include a female as well as a male, and shall include a body corporate :

And generally, unless the contrary shall appear from the context, every word importing the singular number only shall extend to several persons or things, and every word importing the plural number shall apply to one person or thing, and every word importing the masculine gender only shall extend to a female.

Lord Chancellor may convey Estates of Lunatic Trustees and Mortgagees.

3. And be it enacted, that when any lunatic or person of unsound mind shall be seised or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted by virtue of the Queen's sign manual with the care of the persons and estates of lunatics, to make an order that such lands be vested in such person or persons in such manner and for such estate as he shall direct ; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

May convey Contingent Rights.

4. And be it enacted, that when any lunatic or person of unsound mind shall be entitled to any contingent right in any lands upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Lord Chancellor shall direct ; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a deed so releasing or disposing of the contingent right.

Lord Chancellor may transfer Stock of Lunatic Trustees and Mortgagees.

5. And be it enacted, that when any lunatic or person of unsound mind shall be solely entitled to any stock or to any chose in action upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order vesting in any person or persons the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof ;

and when any person or persons shall be entitled jointly with any lunatic or person of unsound mind to any stock or chose in action upon any trust or by way of mortgage, it shall be lawful for the said Lord Chancellor to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any other person or persons the said Lord Chancellor may appoint.

Power to transfer Stock of deceased Person.

6. And be it enacted, that when any stock shall be standing in the name of any deceased person whose personal representative is a lunatic or person of unsound mind, or when any chose in action shall be vested in any lunatic or person of unsound mind as the personal representative of a deceased person, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action or any interest in respect thereof, in any person or persons he may appoint.

Court of Chancery may convey Estates of Infant Trustees and Mortgages.

7. And be it enacted, that where any infant shall be seised or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the infant trustee or mortgagee had been twenty-one years of age, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

Contingent Rights of Infant Trustees and Mortgages.

8. And be it enacted, that where any infant shall be entitled to any contingent right in any lands upon any trust or by way of mortgage, it shall be lawful for the Court of Chancery to make an order wholly releasing such lands from such contingent right,

or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the infant had been twenty-one years of age, and had duly executed a deed so releasing or disposing of the contingent right.

Court of Chancery may convey the Estate of a Trustee out of the Jurisdiction of the Court.

9. And be it enacted, that when any person solely seised or possessed of any lands upon any trust shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said Court to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner and for the same estate.

Court may make Order in Cases where Persons are seised of Lands jointly with Parties out of Jurisdiction of Court, &c.

10. And be it enacted, that when any person or persons shall be seised or possessed of any lands jointly with a person out of the jurisdiction of the Court of Chancery, or who cannot be found, it shall be lawful for the said Court to make an order vesting the lands in the person or persons so jointly seised or possessed, or in such last-mentioned person or persons, together with any other person or persons, in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

Contingent Rights of Trustees.

11. And be it enacted, that when any person solely entitled to a contingent right in any lands upon any trust shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said Court to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance so releasing or disposing of the contingent right.

Court may make Order in Cases where Persons are jointly entitled with others out of the Jurisdiction of the Court to a contingent Right in Lands.

12. And be it enacted, that when any person jointly entitled with any other person or persons to a contingent right in any lands upon any trust shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said Court to make an order disposing of the contingent right of the person out of the jurisdiction, or who cannot be found, to the person or persons so jointly entitled as aforesaid, or to such last-mentioned person or persons, together with any other person or persons; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance so releasing or disposing of the contingent right.

When it is uncertain which of several Trustees was the Survivor.

13. And be it enacted, that where there shall have been two or more persons jointly seised or possessed of any lands upon any trust, and it shall be uncertain which of such trustees was the survivor, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

When it is uncertain whether the last Trustee be Living or Dead.

14. And be it enacted, that where any one or more person or persons shall have been seised or possessed of any lands upon any trust, and it shall not be known, as to the trustee last known to have been seised or possessed, whether he be living or dead, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the last trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

When Trustee dies without an Heir.

15. And be it enacted, that when any person seised of any lands upon any trust shall have died intestate as to such lands without an heir, or shall have died and it shall not be known who

is his heir or devisee, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the lands in the same manner for the same estate.

Contingent Right of unborn Trustee.

16. And be it enacted, that when any lands are subject to a contingent right in an unborn person or class of unborn persons who upon coming into existence would in respect thereof become seised or possessed of such lands upon any trust, it shall be lawful for the Court of Chancery to make an order which shall wholly release and discharge such lands from such contingent right in such unborn person or class of unborn persons, or to make an order which shall vest in any person or persons the estate or estates which such unborn person or class of unborn persons would upon coming into existence be seised or possessed of in such lands.

Power to convey in place of a refusing Trustee.

17. And be it enacted, that where any person jointly or solely seised or possessed of any lands upon any trust shall, after a demand by a person entitled to require a conveyance or assignment of such lands, or a duly authorised agent of such last-mentioned person, have stated in writing that he will not convey or assign the same, or shall neglect or refuse to convey or assign such lands for the space of twenty-eight days next after a proper deed for conveying or assigning the same shall have been tendered to him by any person entitled to require the same, or by a duly authorised agent of such last-mentioned person, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

Power to convey in place of Person entitled to contingent Right.

18. And be it enacted, that where any person jointly or solely entitled to a contingent right in any lands upon any trust shall, after a demand for a conveyance or release of such contingent right by

a person entitled to require the same, or a duly authorised agent of such last-mentioned person, have stated in writing that he will not convey or release such contingent right, or shall neglect or refuse to convey or release such contingent right for the space of twenty-eight days next after a proper deed for conveying or releasing the same shall have been tendered to him by any person entitled to require the same, or by a duly authorised agent of such last-mentioned person, it shall be lawful for the Court of Chancery to make an order releasing or disposing of such contingent right in such manner as it shall direct; and the order shall have the same effect as if the trustee so neglecting or refusing had duly executed a conveyance so releasing or disposing of the contingent right.

Power to convey in place of Mortgagee.

19. And be it enacted, that when any person to whom any lands have been conveyed by way of mortgage shall have died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the reconveyance of such lands, then in any of the following cases it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; that is to say,

When an heir or devisee of such mortgagee shall be out of the jurisdiction of the Court of Chancery, or cannot be found :

When an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such lands or a duly authorised agent of such last-mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered to him by a person entitled as aforesaid, or a duly authorised agent of such last-mentioned person :

When it shall be uncertain which of several devisees of such mortgagee was the survivor :

When it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee whether he be living or dead :

When such mortgagee shall have died intestate as to such lands,

and without an heir, or shall have died and it shall not be known who is his heir or devisee :

And the order of the said Court of Chancery made in any one of the foregoing cases shall have the same effect as if the heir or devisee or surviving devisee, as the case may be, had duly executed a conveyance or assignment of the lands in the same manner and for the same estate.

Power to appoint a Person to convey in certain Cases.

20. And be it enacted, that in every case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, shall, under the provisions of this act, be enabled to make an order having the effect of a conveyance or assignment of any lands, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn, it shall also be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, should it be deemed more convenient, to make an order appointing a person to convey or assign such lands, or release or dispose of such contingent right; and the conveyance or assignment, or release or disposition, of the person so appointed, shall, when in conformity with the terms of the order by which he is appointed, have the same effect in conveying or assigning the lands, or releasing or disposing of the contingent right, as an order of the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, would in the particular case have had under the provisions of this act; and in every case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, shall, under the provisions of this act, be enabled to make an order vesting in any person or persons the right to transfer any stock transferable in the books of the Governor and Company of the Bank of England, or of any other company or society established or to be established, it shall also be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, if it be deemed more convenient, to make an order directing the secretary, deputy secretary, or accountant-general for the time being of the Governor and Company of the Bank of England, or any officer of such other company or society, at once to transfer or join in transferring the stock to the person or persons to be named in the order; and this act shall be a full and complete indemnity and discharge to the Governor and Company of the Bank of England, and all other companies or societies, and their officers

and servants, for all acts done or permitted to be done pursuant thereto.

As to Lands in Lancaster and Durham.

21. And be it enacted, that as to any lands situated within the duchy of Lancaster, or the counties palatine of Lancaster or Durham, it shall be lawful for the Court of the Duchy Chamber of Lancaster, the Court of Chancery in the county palatine of Lancaster, or the Court of Chancery in the county palatine of Durham, to make a like order in the same cases as to any lands within the jurisdiction of the same courts respectively as the Court of Chancery has under the provisions hereinbefore contained been enabled to make concerning any lands; and every such order of the Court of the Duchy Chamber of Lancaster, the Court of Chancery in the county palatine of Lancaster, or the Court of Chancery in the county palatine of Durham, shall, as to such lands, have the same effect as an order of the Court of Chancery: provided always, that no person who is anywhere within the limits of the jurisdiction of the High Court of Chancery shall be deemed by such local courts to be an absent trustee or mortgagor within the meaning of this act.

When Trustees of Stock out of the Jurisdiction.

Lanc. & Durham, 6 & 7 22. And be it enacted, that when any person or persons shall be jointly entitled with any person out of the jurisdiction of the Court of Chancery, or who cannot be found, or concerning whom it shall be uncertain whether he be living or dead, to any stock or chose in action upon any trust, it shall be lawful for the said court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons, together with any person or persons the said Court may appoint; and when any sole trustee of any stock or chose in action shall be out of the jurisdiction of the said Court, or cannot be found, or it shall be uncertain whether he be living or dead, it shall be lawful for the said Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in any person or persons the said Court may appoint.

When Trustee of Stock refuses to Transfer.

23. And be it enacted, that where any sole trustee of any stock or chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, or any interest in respect thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person absolutely entitled thereto, it shall be lawful for the Court of Chancery to make an order vesting the sole right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the said Court may appoint.

When one of several Trustees of Stock refuses to Transfer or Receive and Pay over Dividends.

24. And be it enacted, that where any one of the trustees of any stock or chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action according to the directions of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him or her by such person, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, in the other trustee or trustees of the said stock or chose in action, or in any person or persons whom the said Court may appoint jointly with such other trustee or trustees.

When Stock is standing in the Name of a deceased Person.

25. And be it enacted, that when any stock shall be standing in the sole name of a deceased person, and his or her personal representative shall be out of the jurisdiction of the Court of Chancery, or cannot be found, or it shall be uncertain whether such personal representative be living or dead, or such personal representative shall neglect or refuse to transfer such stock, or receive the dividends or income thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person entitled as aforesaid,

it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said Court may appoint.

Effect of an Order vesting the legal Right to transfer Stock.

26. And be it enacted, that where any order shall have been made under any of the provisions of this act vesting the right to any stock in any person or persons appointed by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, such legal right shall vest accordingly, and thereupon the person or persons so appointed are hereby authorised and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names or otherwise, or relating to the receipt of the dividends thereof, to the extent and in conformity with the terms of such order; and the Bank of England, and all companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order as the said Bank of England, or such companies, associations, or persons, would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made, and shall be equally indemnified in complying with the requisition of such person or persons so appointed as they would have been indemnified in complying with the requisition of the person in whose place such appointment shall have been made; and after notice in writing of any such order of the Lord Chancellor, intrusted as aforesaid, or of the Court of Chancery, concerning any stock, shall have been given, it shall not be lawful for the Bank of England, or any company or association whatever, or any person having received such notice, to act upon the requisition of the person in whose place an appointment shall have been made in any matter whatever relating to the transfer of such stock, or the payment of the dividends or produce thereof.

Effect of an Order vesting legal Right in a Chose in Action.

27. And be it enacted, that where any order shall have been made under the provisions of this act, either by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, vest-

ing the legal right to sue for or recover any chose in action or any interest in respect thereof in any person or persons, such legal right shall vest accordingly, and thereupon it shall be lawful for the person or persons so appointed to carry on, commence, and prosecute, in his or their own name or names, any action, suit, or other proceeding at law or in equity for the recovery of such chose in action, in the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such chose in action.

Effect of an Order vesting Copyhold Lands, or appointing any Person to convey Copyhold Lands.

28. And be it enacted, that whensoever, under any of the provisions of this act, an order shall be made, either by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, vesting any copyhold or customary lands in any person or persons, and such order shall be made with the consent of the lord or lady of the manor whereof such lands are holden, then the lands shall, without any surrender or admittance in respect thereof, vest accordingly; and whenever, under any of the provisions of this act, an order shall be made either by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, appointing any person or persons to convey or assign any copyhold or customary lands, it shall be lawful for such person or persons to do all acts and execute all instruments for the purpose of completing the assurance of such lands; and all such acts and instruments so done and executed shall have the same effect, and every lord and lady of a manor, and every other person, shall, subject to the customs of the manor and the usual payments, be equally bound and compellable to make admittance to such lands, and to do all other acts for the purpose of completing the assurance thereof, as if the persons in whose place an appointment shall have been made, being free from any disability, had duly done and executed such acts and instruments.

When a Decree is made for Sale of Real Estate for Payment of Debts.

29. And be it enacted, that when a decree shall have been made by any court of equity directing the sale of any lands for the payment of the debts of a deceased person, every person seised or possessed of such lands, or entitled to a contingent right therein,

as heir, or under the will of such deceased debtor, shall be deemed to be so seised or possessed or entitled, as the case may be, upon a trust within the meaning of this act; and the Court of Chancery is hereby empowered to make an order wholly discharging the contingent right, under the will of such deceased debtor, of any unborn person.

Court to declare what Parties are Trustees of Lands comprised in any Suit, and as to the Interests of Persons unborn.

30. And be it enacted, that where any decree shall be made by any court of equity for the specific performance of a contract concerning any lands, or for the partition or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any lands, either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said court to declare that any of the parties to the said suit wherein such decree is made are trustees of such lands or any part thereof, within the meaning of this Act, or to declare concerning the interests of unborn persons who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who, upon coming into existence, would be trustees within the meaning of this act, and thereupon it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, to make such order or orders as to the estates, rights, and interests of such persons, born or unborn, as the said Court or the said Lord Chancellor might under the provisions of this act make concerning the estates, rights, and interests of trustees born or unborn.

Power to make Directions how the Right to transfer Stock to be exercised.

31. And be it enacted, that it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, to make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this act shall be exercised; and thereupon the person or persons in whom such right shall be vested shall be compellable

to obey such directions and declarations by the same process as that by which other orders under this act are enforced.

Power to Court to make Order appointing new Trustees.

32. And be it enacted, that whenever it shall be expedient to ^{to make, if per be} appoint a new trustee or new trustees, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees.

The new Trustees to have the Powers of Trustees appointed by Decree in Suit.

33. And be it enacted, that the person or persons who, upon the making of such order as last aforesaid, shall be trustee or trustees, shall have all the same rights and powers as he or they would have had if appointed by decree in a suit duly instituted.

Power to Court to vest Lands in new Trustees.

34. And be it enacted, that it shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to direct that any lands subject to the trust shall vest in the person or persons who upon the appointment shall be the trustee or trustees for such estate as the Court shall direct; and such order shall have the same effect as if the person or persons who before such order were the trustee or trustees (if any) had duly executed all proper conveyances and assignments of such lands for such estate.

Power to Court to vest Right to sue at Law in new Trustees.

35. And be it enacted, that it shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to vest the right to call for a transfer of any stock subject to the trust, or to receive the dividends or income thereof, or to sue for or recover any chose in action, subject to the trust, or any interest in respect thereof, in the person or persons who upon the appointment shall be the trustee or trustees.

Old Trustees not to be discharged from Liability.

36. And be it enacted, that any such appointment by the Court of new trustees, and any such conveyance, assignment, or transfer as aforesaid, shall operate no further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have done.

Who may apply.

37. And be it enacted, that an order, under any of the hereinbefore contained provisions, for the appointment of a new trustee or trustees, or concerning any lands, stock, or chose in action subject to a trust, may be made upon the application of any person beneficially interested in such lands, stock, or chose in action, whether under disability or not, or upon the application of any person duly appointed as a trustee thereof; and that an order under any of the provisions hereinbefore contained concerning any lands, stock, or chose in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the monies secured by such mortgage.

Power to go before the Master in the first instance.

38. And be it enacted, that when any person shall deem himself entitled to an order under any of the provisions hereinbefore contained, either from the Lord Chancellor, intrusted as aforesaid, or from the Court of Chancery, it shall be lawful for him to exhibit before any one of the Masters of the High Court of Chancery a statement of the facts whereon such order is sought to be obtained, and adduce evidence in support thereof; and if such evidence shall be satisfactory to the said Master, he shall, at the request of the person adducing such evidence, give a certificate under his hand of the several material facts found by him to be true, and of his opinion that such person is entitled to an order in the form set forth in such certificate.

Power to petition the Court or the Lord Chancellor.

39. And be it enacted, that any person who shall have obtained such certificate may apply by motion to the Court of Chancery, or to the Lord Chancellor, intrusted as aforesaid, for an order to the effect set forth in such certificate, or for such other order as

such person may deem himself entitled to upon the facts found by the Master.

Power to present Petition in the first instance.

40. And be it enacted, that any person or persons entitled in manner aforesaid to apply for an order from the said Court of Chancery, or from the Lord Chancellor, intrusted as aforesaid, may, should he so think fit, present a petition in the first instance to the Court of Chancery, or to the Lord Chancellor, intrusted as aforesaid, for such order as he may deem himself entitled to, and may give evidence by affidavit or otherwise in support of such petition before the said Court, or the Lord Chancellor, intrusted as aforesaid, and may serve such person or persons with notice of such petition as he may deem entitled to service thereof.

What may be done upon Petition.

41. And be it enacted, that upon the hearing of any such motion or petition it shall be lawful for the said Court or for the said Lord Chancellor, should it be deemed necessary, to direct a reference to one of the Masters in Ordinary of the Court of Chancery to inquire into any facts which require such an investigation, or it shall be lawful for the said Court or for the said Lord Chancellor to direct such motion or petition to stand over, to enable the petitioner or petitioners to adduce evidence or further evidence before the said Court or before the said Lord Chancellor, or to enable notice or any further notice of such motion or petition to be served upon any person or persons.

Court may dismiss Petition with or without Costs.

42. And be it enacted, that upon the hearing of any such motion or petition, whether any certificate or report from a Master shall have been obtained or not, it shall be lawful for the Court, or the Lord Chancellor, intrusted as aforesaid, to dismiss such motion or petition, with or without costs, or to make an order thereupon in conformity with the provisions of this act.

Power to make an Order in a Cause.

43. And be it enacted, that whensoever in any cause or matter, either by the evidence adduced therein, or by the admissions of the parties, or by a report of one of the Masters of the Court of Chancery, the facts necessary for an order under this act shall appear to such Court to be sufficiently proved, it shall be lawful for the said Court, either upon the hearing of the said cause or of

any petition or motion in the said cause or matter, to make such order under this act.

Orders made by the Court of Chancery, founded on certain Allegations, to be conclusive Evidence of the Matter contained in such Allegations.

44. And be it enacted, that whenever any order shall be made under this act, either by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, for the purpose of conveying or assigning any lands, or for the purpose of releasing or disposing of any contingent right, and such order shall be founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or devisee of a mortgagee is out of the jurisdiction of the Court of Chancery or cannot be found, or that it is uncertain which of several trustees, or which of several devisees of a mortgagee, was the survivor, or whether the last trustee, or the heir or last surviving devisee of a mortgagee, be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or devisee, then in any of such cases the fact that the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, has made an order upon such an allegation, shall be conclusive evidence of the matter so alleged in any court of law or equity upon any question as to the legal validity of the order: provided always, that nothing herein contained shall prevent the Court of Chancery directing a re-conveyance or re-assignment of any lands conveyed or assigned by any order under this act, or a re-disposition of any contingent right conveyed or disposed of by such order; and it shall be lawful for the said Court to direct any of the parties to any suit concerning such lands or contingent right to pay any costs occasioned by the order under this Act, when the same shall appear to have been improperly obtained.

Trustees of Charities.

45. And be it enacted, that it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, to exercise the powers herein conferred for the purpose of vesting any lands, stock, or chose in action in the trustee or trustees of any charity or society over which charity or society the said Court of Chancery would have jurisdiction upon suit duly in-

stituted, whether such trustee or trustees shall have been duly appointed by any power contained in any deed or instrument, or by the decree of the said Court of Chancery, or by order made upon a petition to the said Court under any statute authorising the said Court to make an order to that effect in a summary way upon petition.

No Escheat of Property held upon Trust or Mortgage.

46. And be it enacted, that no lands, stock, or chose in action vested in any person upon any trust or by way of mortgage, or any profits thereof, shall escheat or be forfeited to Her Majesty, Her heirs or successors, or to any corporation, lord or lady of a manor, or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his or her co-trustee, or descend or vest in his or her representative, as if no such attainder or conviction had taken place.

Act not to prevent Escheat or Forfeiture of Beneficial Interest.

47. And be it enacted, that nothing contained in this act shall prevent the escheat or forfeiture of any lands or personal estate vested in any such trustee or mortgagee, so far as relates to any beneficial interest therein of any such trustee or mortgagee, but such lands or personal estate, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if this act had not passed.

Money of Infants and Persons of unsound Mind to be paid into Court.

48. And be it enacted, that where any infant or person of unsound mind shall be entitled to any money payable in discharge of any lands, stock, or chose in action conveyed, assigned, or transferred under this act, it shall be lawful for the person by whom such money is payable to pay the same into the Bank of England, in the name and with the privity of the Accountant-general, in trust in any cause then depending concerning such money, or, if there shall be no such cause, to the credit of such infant or person of unsound mind, subject to the order or disposition of the said Court; and it shall be lawful for the said Court, upon petition in a summary way, to order any money so paid to be invested in the public funds, and to order payment or distribu-

tion thereof, or payment of the dividends thereof, as to the said Court shall seem reasonable; and every cashier of the Bank of England who shall receive any such money is hereby required to give to the person paying the same a receipt for such money, and such receipt shall be an effectual discharge for the money therein respectively expressed to have been received.

Court may make a Decree in the Absence of a Trustee.

49. And be it enacted, that where in any suit commenced or to be commenced in the Court of Chancery it shall be made to appear to the Court by affidavit that diligent search and inquiry has been made after any person made a defendant, who is only a trustee, to serve him with the process of the Court, and that he cannot be found, it shall be lawful for the said Court to hear and determine such cause, and to make such absolute decree therein against every person who shall appear to them to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and the same manner as if such trustee had been duly served with the process of the Court, and had appeared and filed his answer thereto, and had also appeared by his counsel and solicitor at the hearing of such cause: provided always, that no such decree shall bind, affect, or in anywise prejudice any person against whom the same shall be made, without service of process upon him as aforesaid, his heirs, executors, or administrators, for or in respect of any estate, right, or interest which such person shall have at the time of making such decree for his own use or benefit, or otherwise than as a trustee as aforesaid.

Powers of the Master.

50. And be it enacted, that when any person shall, under the provisions of this act, apply to one of the Masters of the Court of Chancery in the first instance, and adduce evidence for the purpose of obtaining the certificate of such Master as a foundation for an order of the said Lord Chancellor, intrusted as aforesaid, or the said Court of Chancery, it shall be lawful for the said Master to order service of such application upon any person, or to dismiss such application, and to direct that the costs of any persons consequent thereon shall be paid by the person making the same; and all orders of the Master under this act shall be enforced by the same process as orders of the Court made in any suit against a party thereto.

Costs may be paid out of the Estate.

51. And be it enacted, that the Lord Chancellor, intrusted as aforesaid, and the Court of Chancery, may order the costs and expenses of and relating to the petitions, orders, directions, conveyances, assignments, and transfers to be made in pursuance of this act, or any of them, to be paid and raised out of or from the lands or personal estate, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said Lord Chancellor or Court shall think proper.

Commission concerning Person of Unsound Mind.

52. And be it enacted, that upon any petition being presented under this act to the Lord Chancellor, intrusted as aforesaid, concerning a person of unsound mind, it shall be lawful for the said Lord Chancellor, should he so think fit, to direct that a commission in the nature of a writ de lunatico inquirendo shall issue concerning such person, and to postpone making any order upon such petition until a return shall have been made to such commission.

Suit may be Directed.

53. And be it enacted, that upon any petition under this act being presented to the Lord Chancellor, intrusted as aforesaid, or to the Court of Chancery, it shall be lawful for the said Lord Chancellor or the said Court of Chancery to postpone making any order upon such petition until the right of the petitioner or petitioners shall have been declared in a suit duly instituted for that purpose.

Powers of Court of Chancery to Extend to Property in the Colonies.

54. And be it enacted, that the powers and authorities given by this act to the Court of Chancery in England shall extend to all lands and personal estate within the dominions, plantations, and colonies belonging to Her Majesty (except Scotland).

Powers given to Court of Chancery may be exercised by that Court in Ireland.

55. And be it enacted, that the powers and authorities given by this act to the Court of Chancery in England shall and may be exercised in like manner and are hereby given and extended to the Court of Chancery in Ireland with respect to all lands and personal estate in Ireland.

*Powers of Lord Chancellor in Lunacy to extend to Property
in the Colonies.*

56. And be it enacted, that the powers and authorities given by this act to the Lord Chancellor of Great Britain, intrusted as aforesaid, shall extend to all lands and personal estate within any of the dominions, plantations, and colonies belonging to Her Majesty (except Scotland and Ireland).

*Powers of Lord Chancellor in Lunacy may be exercised by
Lord Chancellor of Ireland.*

57. And be it enacted, that the powers and authorities given by this act to the Lord Chancellor of Great Britain, intrusted as aforesaid, shall and may be exercised in like manner by and are hereby given to the Lord Chancellor of Ireland, intrusted as aforesaid, with respect to all lands and personal estate in Ireland.

Short Title.

58. And be it enacted, that in citing this act in other acts of Parliament, and in legal instruments and in legal proceedings, it shall be sufficient to use the expression "The Trustee Act, 1850."

Commencement of Act.

59. And be it enacted, that this act shall come into operation on the 1st day of November 1850.

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